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NEWS & ANALYSIS

Environmental Citizen Suits at Thirtysomething: A Celebration and Summit

by James R. May, Bruce J. Terris, Zygmunt J.B. Plater, Ann Powers, Michael D. Axline, David Bookbinder, Peter Lehner, and Robert F. Kennedy Jr.

Preface

by James R. May

In 1970, the U.S. Congress gave citizens the remarkable authority to file federal lawsuits as "private attorneys general" to enforce the Clean Air Act (CAA).[1] Congress intended citizen suits to fill the vast void left by inadequate enforcement by federal and state regulators, and to ensure compliance and deter illegal activity. The approach stuck. Now more than one dozen federal environmental statutes, numerous state laws, and myriad foreign laws allow for such "environmental citizen suits." In 2002 alone, environmental and conservation groups, states, landowners, developers, and companies collectively provided advance notice of intent to bring federal environmental citizen suits nearly 200 times.

To commemorate the inception of the first environmental citizen suits, on April 4, 2003, the *Widener Law Symposium Journal* and the Mid-Atlantic Environmental Law Center, joined by cosponsors the *Environmental Law Reporter*®, Sierra Club, and Trial Lawyers for Public Justice, hosted a conference at the university's campus in Wilmington, Delaware, *Environmental Citizen Suits at Thirtysomething: A Celebration and Summit*. The conference featured a virtual who's who of leading environmental law lawyer advocates and law professors.

The transcript from the conference's morning session (below), provides a rare behind-the-scenes glimpse into landmark cases from those who litigated them.

Attorney Bruce J. Terris discusses how he came to work on his first environmental case, *Sierra Club v. Morton*,[2] and how Article III standing law followed a serpentine path that led nearly 30 years later to *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc*.[3] After litigating standing for three decades, Mr. Terris concludes the doctrine lacks constitutional foundation, and warrants rebuff.

Prof. Zygmunt J.B. Plater (Zyg) explains the fascinating circumstances that led to *Tennessee Valley Authority v. Hill*,[4] and wonders to what extent citizen litigators have lost their connection to grass-roots groups.

Prof. Ann Powers examines the ups and downs of litigating *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*,[5] and extols the importance of cultivating the next generation of citizen lawyers.

Prof. Michael D. Axline tells the remarkable story of those who came to litigate cases to protect the northern spotted owl and the primeval forests of the Pacific Northwest. Legal victories aside, he views the cases as a cautionary tale for vigilance.

Sierra Club Senior Attorney David Bookbinder provides amusing anecdotes about litigating the Virginia total maximum daily load (TMDL) case, including how fast food carryout can influence the outcome of a case.

Last, New York State Assistant Attorney General Peter Lehner explains how some states are using environmental citizen suits in novel ways to address some of environmental law's most vexing challenges, from enforcing the federal "new source review" program, to using citizen suits to curb wanton release of greenhouse gases.

Prof. Robert F. Kennedy Jr.'s keynote address is a clarion call for citizen action, and embodies the themes from the morning session. He informs us how citizen suits propagate democracy, provide appropriate economic feedback to the marketplace, and help make the world a better place for rivers, plants, animals, people of all walks, and generations to come.

The conference's afternoon session explored practical issues and perspectives that make environmental citizen suits challenging to litigate. Practical issues included jurisdiction and notice, statutory and common-law preclusion, standing,

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1. 42 U.S.C. §7604, ELR STAT. CAA §304.
2. 451 U.S. 287, 11 ELR 20357 (1981).
3. 120 S. Ct. 693, 30 ELR 20246 (2000).
4. 437 U.S. 153, 8 ELR 20513 (1978).
5. 611 F. Supp. 1542, 15 ELR 20663 (E.D. Va. 1985), *aff'd*, 791 F.2d 304, 16 ELR 20636 (4th Cir. 1986), *vacated & remanded sub nom.* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 18 ELR 20142 (1987), *on remand sub nom.* Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 844 F.2d 170, 18 ELR 20941 (4th Cir. 1988), *penalty reinstated on remand sub nom.* Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 688 F. Supp. 1078, 18 ELR 21275 (E.D. Va. 1988), *aff'd in part sub nom.* Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 20 ELR 20341 (4th Cir. 1989).

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mootness, sovereign immunity, supplemental environmental projects, and attorneys fees. Speakers also provided insights about litigating CAA, Endangered Species Act (ESA),[6] and "agency-forcing" citizen suits, from the public interest, federal government, and private sector perspectives. The conference culminated with discussions of how citizen suits affect international environmental law in general, and sustainable development in particular, from the emerging market countries of the former Soviet eastern bloc, to the earth's four corners. The *Widener Law Symposium Journal* is publishing the proceeds from the afternoon session in the months to come.

MR. TERRIS: A long, long time ago, 30 years or more ago, when there were no environmental lawyers in this country to speak of, no environmental law courses, virtually no environmental advocacy groups, and only a few environmental organizations of any type, the Natural Resources Defense Council (NRDC) was just getting its first funding from the Ford Foundation. [The] Environmental Defense Fund started its attack on dichlorodiphenyltrichloroethane (DDT), and the Sierra Club Legal Defense Fund began work, staffed with volunteer lawyers. That was essentially the extent of environmental law advocacy in this country.

I was not an environmental lawyer. I had done a lot of other things, had been the in federal government and then handled a number of cases before the U.S. Supreme Court cases. I had just gone out into private practice to do public interest law not knowing exactly what I was going to do. I then got a call from Jim Moorman, who was then the head of the Sierra Club Legal Defense Fund. He said that he [would like for] me to write an amicus brief in *Morton*.[7] It was a rather strange request, I thought, since the Sierra Club already had lawyers. Why was I being asked to write an amicus brief? At that time one did not have to disclose to the Court that you were being paid by one of the parties in the case.

So the Sierra Club hired me to represent the National Wildlife Federation (NWF) and a group [of] other environmental organizations and to write an amicus brief because the Sierra Club was not very confident in its own lawyer, which was not too strange a view because if you go back and look at *Morton* you will see that there was no allegation of standing advanced whatsoever in the complaint, and that is why they got into some difficulty. The court of appeals had held that they did not have standing. So I wrote a very long brief, one that would be far beyond the length that the Court now allow[s]; it analyzed every available decision on the issue of standing. Aside from that, the only thing that I can say that was distinctive about the brief was I did something that brief writers did not usually do, and still do not typically do, which involved something [that] was not in the record. The first page of the brief had a picture of the area that was going to be destroyed, the mineral king in the Sierra Nevada Mountains. I noticed as I was rereading the opinion recently that it begins with a description of the natural beauty of the area.

Now, people tend to think of *Morton* as a[n] victory for the environmental movement. Of course, it was not; the Court upheld the lower court's determination that the plaintiff lacked standing. But for some reason, and this was in many ways the crucial point of the decision, the case was sent back to the district court rather than dismissed, which I think is what the Court would do with it today. It was sent back and new allegations were made and the standing was upheld. Of course, the reason it is cited so frequently is because it has the line that environmental harm and aesthetic harm are recognized. So we environmentalists cite it over and over again as if it had been a victory.

However, and I'll come to this at the end because I do want to say something more than war stories, that in my opinion, *Morton* was a terrible defeat and I feel very regretful now in that the brief I wrote was entirely wrong. The reason is that, in my view, there is no support for the notion of constitutional standing in American law. It should have been attacked at the beginning, and it should have been attacked since.

Some of you are probably puzzled by that comment. The last time I publicly made such a remark, a very distinguished jurist, Judge Richard Arnold, was in the audience and he acted as though I had said something to the effect that *Marbury v. Madison*[8] was wrongly decided. More on this later.

After *Morton* I became an environmental lawyer. I was not really an environmentalist. I wasn't a hiker then; I'm not one now. I wasn't a canoeist then; I'm not one [now]. I do have considerable appreciation for the environment, but the hikers of the Sierra Club would regard me as probably beyond the pale. The only hiking I've ever done of any consequence is when one of my clients, years ago, was planning on building a dam in the High Ross area of the northern Cascade Mountains and they thought I couldn't represent them in court adequately unless I saw where the dam was going to be built. So I hiked for two days with my wife and saw the area. We lost the case. And my wife has two bad knees to this day.

But in any event, out of *Morton* came the fact that I became an environmental lawyer. I had more experience than almost anybody else in the country; I handled an amicus brief in one case. As a result of that, my partners and I built a law firm that probably, on the environmental side, is the biggest advocacy firm in the country. It only has nine lawyers. Most of what we do is environmental work. I think we've handled more Court cases in the environmental field than anybody, even the organizations which have many, many more lawyers than we do. We handled significant deterioration cases before the Court prior to the provision being incorporated into the [CAA],[9] arguing on much vaguer grounds. We were successful in the Court by the magnificent victory of 4 to 4.

We handled a clearcutting case in West Virginia which resulted in a statute which at least somewhat restricts clearcutting, and we were counsel in a case in a federal district court in California which, I suspect, probably involved more acreage than any suit in American history, and which prevented the destruction of 60 million acres of roadless areas. During the 1970s, when there were few [or] were no environmental lawyers in existence, we handled cases from Florida to Alaska. But those days ended, of course. All the environmental organizations hired their own lawyers.

6. 16 U.S.C. §1540(g), ELR STAT. ESA §11(g).

7. 451 U.S. at 287, 11 ELR at 20357.

8. 5 U.S. 137 (1803).

9. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

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Therefore, they decided they did not want an outside law firm that they had to pay by the hour.

That resulted in us having to get our own cases and go to the records of state and federal agencies and find cases under the Clean Water Act (CWA),[10] and sometimes but less frequently under the CAA. So for the last 20 years, besides other kinds of cases, which we continued to handle as well, we looked for our own cases. One of those cases we found was the *Laidlaw* case.[11]

Laidlaw is important because it seems to have halted the trend of the campaign of Justice Antonin Scalia to essentially destroy citizen suits in this country. If you want to find out more about the campaign, I would urge you to read his law review article in the Suffolk law journal.[12] It's an amazing article. It basically says the only people that ought to be able to bring suits in this country are businesses. Consumers should not be able to bring them, environmentalists ought not be able to bring them, the public should not be able to bring them. They don't need citizen suits. They're in the majority. The minority—and to Justice Scalia, the minority is not blacks, women, gays, and the disabled, but rather big business—should be able to bring the lawsuits. As far as the rest is concerned, they shouldn't have citizen suit rights. Yes, federal statutes won't be enforced. But that's good, very good. It's good to lose these statutes in the maze of the federal bureaucracy. That's good government. Out of that comes, as you will see, his campaign to limit standing.

The 7 to 2 vote in *Laidlaw* at least may have halted that trend or at least somewhat interrupted it. Even the Chief Justice voted with the majority. However, let me just say a few other things that by reading the Court's opinions you may not quite recognize. First of all, certiorari was not granted on the standing issue; in fact, that issue was not decided by the court of appeals. So, therefore, when we petitioned, we could not petition on standing. The defendants, out of the generosity of their heart, I'm sure, decided that they wanted to argue standing as well as the issue in the case, which was mootness. We said okay. If you are going to argue standing, then we'll argue standing. We pointed out to the Court that we did not think it was appropriate for Laidlaw to be raising the standing issue because it had not been raised in the certiorari petition. The majority of the Court obviously wanted to decide standing. They reached out, contrary to their normal principles, and decided an issue that really was not before them. Normally the issue would have been remanded to the court of appeals. I think that's very important.

The second point is that the case was brought in 1992. It reached the Court and was decided more than eight years later. The federal courts have demonstrated, on numerous occasions, they are not equipped to handle complex environmental matters. That type of delay is not unique to *Laidlaw*. We have a case that has been pending before the federal district court in New Jersey for over 11 years. It has been pending after trial for three years. That is not the only such example. We have another case that has been pending in South Carolina for 11 years. It appears that federal judges simply cannot cope with the complexity of environmental cases when they are pressed to conclusion.

Another interesting point about *Laidlaw* is that the problem we thought we had [in] was not standing. We always thought we had standing. It seemed to us it was rather self-evident we had standing. The real issue in *Laidlaw*, and why it was an extremely dangerous case to bring, dangerous in the sense that we would commit large amounts of resources and then might never receive either a victory on the merits or attorneys fees, was preclusion. That's because on the day before we filed suit, the state filed suit. Well, the state sort of filed suit. Laidlaw really filed suit against itself because it wrote the complaint and paid the filing fee. It persuaded the state to do it, and that required us to litigate for several years over the issue of preclusion, which we finally did win.

Finally on the *Laidlaw* case, and in many ways the most practical point I can make regarding it and environmental citizen suits in general, is the enormous difficulty in running a practice based on citizen suit litigation. People look at the practice, at the statutory attorneys fee provisions and they say, well, this is certainly a good basis for running a practice. *Laidlaw* demonstrates beyond any doubt the extreme difficulty of doing so. We have at the moment about $2.8 million tied up in the litigation. We have spent probably several hundred thousand dollars in expert fees out of our own pocket. We supposedly won a great victory at the Court, but Laidlaw is in bankruptcy. If we recover anything from Laidlaw, it will range somewhere between $30,000 and $300,000 out of $2.8 million, and that will be 11, 12, or 13 years after we brought suit. Unfortunately, that is not the only such example, but I will not go into more.

Let me go back to a point now that I made before about how I feel extremely regretful that I did not include in the *Morton* amicus brief an attack on the whole concept of constitutional standing. I said a few moments ago there is no support in American law for constitutional standing beyond what was made up by the Court. If you look carefully at the U.S. Constitution, you will find that there's nothing in the provision relating to case or controversy[13] that suggests in the slightest any doctrine of citizen standing.

What is a "case"? There's a case when Sierra Club sued in the *Morton* litigation even though they had not alleged that their members had been hurt. That was a case, by any definition, that anybody would care about. I might say they had an enormous interest. The group was, after all, created to protect the Sierra Nevada Mountains. That was a "case," there was a "controversy," too, but, by the way, those words never appear together in the Constitution. There is no history to support the idea of constitutional [standing]. Instead, the Court in the 19th century made absolutely clear that any citizen can sue to enforce statutes. I don't think there's any question about that.

When, then, did the notion of constitutional standing arise? It arose about 80 years ago when the Court simply invented it. Having done so, by the application of *stare decisis*, the Court simply repeated the same language over and over and built a bigger and bigger edifice. Justice Scalia, the strict constructionist, admits this when he acknowledges that the Constitution is, on this point, not clear. I would have thought he, of all people, would have concluded that if something isn't clear in the Constitution, that means it's not there. His entire argument goes the notion that standing depends on the doctrine of separation of powers. I submit to

10. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

11. 120 S. Ct. at 693, 30 ELR at 20246.

12. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

13. U.S. CONST. art. III, §2.

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you that is total nonsense. Standing goes to the character of the plaintiffs. Separation of powers ought to go to the character, the kind of issue that's involved.

If you want to protect separation of powers, you want to look to political question, ripeness doctrine, vagueness, doctrines that are intended to protect the judiciary from deciding issues it should not decide. It is only happenstance when standing has anything to do with separation of powers. What separation-of-powers issue was in the *Laidlaw* case? There was none. Therefore, it is simply a made-up argument, essentially to protect a political argument.

That gets me back to what I noted before, that Justice Scalia believes that federal courts should not hear certain kinds of cases, not because of the issues presented, but rather on the basis of who the plaintiff is. He doesn't want a consumer in federal court. He doesn't want environmentalists. He wants them to have to go to Congress. When they've gone to Congress and they've won, he then wants their hard-won victory to be lost in the federal bureaucracy.

I would hope by this literal attack on the notion of constitutional standing to encourage you, as I intend to in the future, to see if gradually we can't attack it in the courts.

Thank you very much.

PROFESSOR PLATER: "Citizen Environmental Suits: Dinosaurs? Unguided Missiles? Needed Now More Than Ever?"

This was the provisional title for my presentation. I was invited, I surmise, primarily to tell a fish story about a notorious lawsuit that my students and I launched in Tennessee in the mid-1970s.[14] The case covered an intense seven years, long ago, (which finally now I am in the throes of trying to pin down in a retrospective book). This old snail darter—Tellico Dam case, however, seems to frame a question about what we did then and what we do now that lurks in the shadows behind today's Symposium on Citizen Litigation. That question echoes those wry moments when my adolescent daughters look at me with their eyes and body language reflecting the usually-unspoken question: "Daddy, are you a dinosaur?"

Things have changed so much since those days after Earth Day, with the kind of litigation we then were waging. Or have they? Do citizen suits still today hold the important societal role that they clearly played in the first 30 years of environmental law? And to what extent, if they do hold that role, has it really become quite different? The reality is that it was citizen suit litigation that created environmental law in the first place, and ever since then advocates have faced a sustained campaign in courts and legislatures—the Scalian campaign that Bruce Terris was talking about is only a part of it—to roll back citizens' ability to bring environmental lawsuits. It's the ultimate complement, I suppose, that in a national debate your opponents seek to remove your seat at the table. Current assertions that environmental enforcement law should be returned to a model of nuanced administrative discretion, an agency-dominated system less vulnerable to citizen intervention, are an attempt to retreat to the pre-Earth Day past. But the continuing history of environmental law argues that citizen suits still today mark the cutting edge of modern pluralistic multicentric democracy. If we forget that, we are missing one of the most important lessons of the last 50 years.

This particular fish-and-dam story begins in 1973 when I traveled down to the University of Tennessee in Knoxville as a green assistant professor teaching property, land use, and environmental law. As the only environmental law teacher in the entire state of Tennessee at that time, a lot of intriguing things dropped in my lap.

A student in my environmental law class, Hank Hill, came into my office looking for advice on a paper topic. While he'd been out of law school during the last term, he had hung out with a bunch of fish biology grad students. With their professor, they told him, they'd found in the middle of the Tellico Dam project area a little endangered perch (seen in this print which ultimately became Exhibit 12 at trial, perhaps looking more attractive here in the exhibit than in reality). Hank asked: "Do you think the fact that this is an endangered species in the middle of the dam project would be enough for a 12-page paper?"

The natural resources at issue in the case from the very beginning were not only the fish, of course, but also the entire river valley habitat for which the fish served as a vivid legal indicator. The Little Tennessee River was a truly extraordinary place, 33 miles of flowing river coming out of the mountains, running through a beautiful gently rolling countryside. I had come to know the river intimately. I am a fly fisherman. The river flowing gently through farm country was easy to wade and not difficult to paddle, and my students and I often would fish or float the Little Tennessee. The river was really quite extraordinary. A quarter of a mile wide and you could wade it all, a blue-green sheet of cool, clear, highly oxygenated water coming out of the limestone of the mountains, rich in minerals, flowing silkily over broad shallow shoals and riffles.

On an early morning we could be standing there in the middle of the river and the mayflies would be coming up out of the waters like a snowstorm in reverse. Wherever you looked, trout were swirling and gulping across the broad surface of the river. It had been that way for thousands of years. As you would look up from the river, there would be Cherokee townsites marked by burial mounds. The heart of the Cherokee confederation was in these fertile fields along the river, including Echota, their Jerusalem holy city of refuge.

In fact, the archeologists had dug down and found the oldest sites of continuous human habitation in all of the United States right there. Ten thousand years of people harvesting fish and harvesting the fields. As you walked across the fields to go fishing, on the plowed fields after a rain you would see bits of pottery and arrowheads. There were 340 family farms spread through the valley, descendants of the white Anglos who had moved in after Andrew Jackson, threw the Cherokees out, pushed most of them to Oklahoma on a trail of tears. But the "Qalla Band" of Cherokees, the "wild ones" I ultimately represented, had hidden out when

14. Hill v. Tennessee Valley Auth., 419 F. Supp. 753, 6 ELR 20583 (E.D. Tenn. 1976), *rev'd*, 549 F.2d 1064, 7 ELR 20172 (6th Cir. 1977), *aff'd sub nom.* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 8 ELR 20513 (1978). In a recent online poll of environmental law professors from across the country seeking a consensus on America's 10 most important environmental protection court cases, *Tenneesee Valley Authority* received the highest number of votes, almost twice as many as the two cases that placed second (Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 14 ELR 20507 (1984) and Ethyl Corp. v. EPA, 541 F.2d 1, 6 ELR 20267 (D.C. Cir. 1976)). Posting of James Salzman, salzman@wcl.american.edu, to envlawprofs@darkwing.uoregon.edu (Oct. 26, 2001).

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Andy came through. They went up into the mountains and then when Jackson's army had left [they] came down and settled over on the North Carolina side of the [Smoky Mountains (Smokies)], still living there in the 1970s.

Fishing in that river I still sometimes heard medicine gatherers "going to water." Ammoneta Sequoia and his brother John, great-great-grandchildren of Chief Sequoia (who had been born in Toskegee Town, right where I was fishing) would regularly and clandestinely come to the valley to gather medicine.

The Tennessee Valley Authority (TVA), however, had built its reputation and its dominant regional political momentum building dams—by this time 68 dams—wherever it could conceivably find a place for them. This was, they said, to be the site of the 69th, probably the last of them. Up to then TVA had created 2,500 linear miles of impounded river, and now they wanted to take this last place, this last big stretch of clear flowing river and change it into something else.

What was the federal agency's plan? At its heart, as an authoritative study subsequently established,[15] its primary object was to develop a rationale for building another dam, a bureaucratic drive to stay in the project-construction business. Although America (which heard so much hyperbole about this fish-dam story over that decade) never realized it, the official project benefits claimed to justify this Tellico Dam were *not* for electricity or water supply, but for *recreation* and *real estate development*. The dam itself was small, a pip-squeak of a project, with only $4 million worth of concrete and a line of earthen dikes across the broad meadows, but it would change the 33 miles of flowing river into a long undulating flatwater reservoir that TVA economists assessed as $2 million annually in recreation benefits.[16] Moreover, by condemning 60 square miles of farmland for the project, the TVA promoters claimed substantial benefits from industrial development land sales. The federal government would condemn the farmers for an average of $350 an acre, and sell it at a substantial profit to corporations, including Boeing, that hypothetically would develop a lakeside model city with 40,000 people and 26,000 jobs for the poor residents of east Tennessee. That was the case for the dam. I am not making this up. (The city would, however, require a congressional subsidy of $850 million that of course was not figured into the benefit-cost analysis.) (If you really care about poor people, we were told, you environmentalists should back off and let this job-producing project continue.)

From the beginning the citizens in the coalition against Tellico Dam (more than 20 groups and more than 200 active participants over the years) tried to fight the project on its [de]merits in every way they could. Starting in 1970 or so, they tried to show the public and the government that the Tellico project made no practical or economic sense. Echoing a classic citizen environmental stance, they pointed out: (1) that that the purported *benefits* were a joke; and (2) that the anticipated *costs* were outrageously underestimated, not only in terms of economic costs, but the opportunity costs of losing such a place. (As to historical and cultural costs, TVA said that there's no way to value the birthplace of Chief Sequoia, no way to value the heart of the Cherokee federation, so those values are . . . zero. The loss of prime agricultural lands and the community of 300-plus families? TVA said there is a glut of farmland in the [United States].) The environmental coalition also argued that there were far, far better *alternatives*: If you really want economic development, create a tourist route up through the valley into the Great [Smoky Mountains National] Park, getting the farmers back on their lands, while exploiting the historical sites and flowing river recreation. The university economists told us there were far better ways to develop the economics and all the other qualities of the valley for optimal human benefit without a dam.

TVA responded to the early citizen efforts not by discussing or negotiating, but by a political blitzkrieg. Leaders of the group were subjected to Internal Revenue Service audits. A media campaign in Tennessee cast the citizen critics as politically dubious agitators. When the citizens originally went to Washington to testify against the project on its merits, at TVA's instigation the pork committees treated them as subversives. So the citizen coalition went to court under [the National Environmental Policy Act (NEPA)][17] because TVA had refused to do an environmental impact statement (EIS). Why? "Because we are an *emergency* agency, and emergency agencies do not have to comply with statutes like NEPA." (Emergency? What's the emergency? The Depression! Uh-right.) Eventually TVA had to do an EIS. But ultimately all NEPA requires is an accurate EIS catalog of the bad things that will transpire from the agency's action, and having done the EIS, on they can roll. The NEPA litigation came to naught, and the ragtag citizen coalition fell apart.

Then in October my student, Hank Hill, having discovered that term-paper-topic-of-a-lifetime, said to me:

> Look, we've been invited to go down some night soon to Fort Loudon, down on the banks of the river, to a potluck supper with some of the old anti-dam coalition. What we've been discovering about the [ESA] makes some of that old coalition want to talk to us about maybe trying to go up against TVA once more, using the snail darter and the ESA.

Hank and I drove down one evening later that week to the little British fort that still sat right by the river, where the anti-dam coalition had traditionally met to plan their campaigns against Tellico Dam. Who was there? Farmers. A lot of fisherman. A representative from the local Sierra Club,

15. *See* William Bruce Wheeler & Michael J. McDonald, TVA and the Tellico Dam, 1936-1979: A Bureaucratic Crisis in Post-Industrial America 3-33 (1986) (on the Feb. 13, 1959 Watts Bar meeting). *See also* Stephen J. Rechichar & Michael R. Fitzgerald, The Consequences of Administrative Decision: TVA's Economic Development Mission and Intragovernment Regulation (1983). These two books are excellent sources of background data on the history and merits of the controversy and TVA's adamancy in pushing the dam in the face of the law and critical analysis on the merits.

16. Normally recreation economics for flowing water rate far higher in economic benefits than for flatwater, especially where the former has become a unique resource by the loss of all major surrounding flowing river stretches. But TVA's economists were induced to dismiss the flowing-river recreational benefits as "speculative," hence incalculable, and the proreservoir estimations stood. As so often in porkbarrel project cost-benefit accounting, no legitimate economists outside the agency have ever considered the agency economic accounting to be credible, but the political momentum behind the pork, and judicial deference to politics and agency discretion, mean that citizen litigants almost never are able to challenge project justifications in realistic economic terms. This adds a sobering perspective correcting the caricature of citizen environmentalists filing lawsuits in opposition to sound economics. More typically, if the planning is done right, good ecology is good economics.

17. 42 U.S.C. §§4321-4370d, ELR Stat. NEPA §§2-209.

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the local historical society chapter, a representative from the [NWF], flower club people, the Sweetwater Pig Farmers Association—you get the idea. Not an elitist bunch of beltway policy wonks. The little group listened intently as Hank and I discussed his term paper.

There was an elderly farmer sitting there, Asa McCall, grizzled, clad in overalls, who had been holding off the TVA marshals with a shotgun and a German shepherd (and phone calls to the local reporters who would publicize photos of the TVA dragging an old farmer from his property). Asa said: "I've never heard of this fish before, but if it can save our farms, then I say go for it." He took off his hat and passed it around as a collection plate. We took in 29 bucks and that was the start of the litigation.

We went to the [NWF's] legal counsel. "Please, you got to help us. We have the facts and the law, but no money and no expertise in facing down a porkbarrel agency." "No, no, we won't touch this. It's a loser legally and politically," was the reply. We went to the other national groups. "No way." They said it was too dangerous, not in terms of Bruce Terris' warning that you can go broke doing these cases, but as to what the backlash repercussions could do to environmental law. That's a serious question, isn't it? But in our view the law was clear. Section 7 of the [ESA][18] quite clearly stated that all federal agencies shall ensure that nothing they do will: (1) jeopardize the continued existence of endangered species; or (2) destroy or modify their critical habitats. There you go . . . two definable causes of action.

We got the fish listed and filed the complaint. I have to say, it didn't take a great lawyer. The federal district court, though it denied the injunction, gave us clear findings that the project would jeopardize the continued existence of the species and destroy its critical habitat. We filed an appeal to the [U.S. Court of Appeals for the] Sixth Circuit, and TVA accelerated their bulldozing and barn blasting in the valley. At one of their strategy meetings the TVA lawyers reportedly said that by the time we plaintiffs stand up in Cincinnati, there won't be a tree left in all of the reservoir area.[19]

But the Sixth Circuit gave us our injunction, and the Court affirmed. Then we had serious congressional hearings for the first time on the real merits of the dam project. Why? Because an injunction makes people finally pay attention. We got the merits out on the hearing record, although the press didn't cover the story. Then we were the catalyst and first target of the God Squad Amendments to the ESA, a thorough-going economic review of the project to decide whether or not the species should be put at risk of extinction.

The God Squad met January 19, 1979. The committee staff economists made a long, devastating analysis of the Tellico Dam's economics. Then there was a protracted silence, as the committee members, mostly cabinet officers, sat there wondering how to proceed. There never had been a God Squad before this day. Finally Charles Schultz, then chairman of the Council of Economic Advisors, cleared his throat. "Well," he said: "The interesting phenomenon is that here is a project that is *95% complete*, and if one takes *just the cost of finishing it* against the *total* benefits, and does it properly, *it still doesn't pay*—which says something about the original design."[20] And everybody laughed. But strangely the media didn't pick up the story vindicating the little fish and its environmental extremist supporters.

Try as we might, over all those years, talking to more than 120 reporters, we couldn't get away from the endangered species put-down cliché: what's the story?—little fish, big dam. (And behind that cliché, as so often in observations about environmental citizen suits, lurked the classic false trade off purported by conventional wisdom: "Which do you care about? The environment, or the economy? You have to choose; you cannot have both." The darter stood for *environment*, so the dam must represent *economic benefits*.) And no amount of energetic fact-lobbying seemed able to get us pass that ultimately destructive cliché.

So there the project sat for six months after the God Squad's unanimous verdict, while we desperately tried to get the Carter Administration to get farmers back on their lands and some form of river-based program going. Then late one evening TVA got a member of Congress to add a rider to an appropriations bill exempting the Tellico project from all laws, state and federal, and overturning for good measure a realistic cost-accounting review process President Jimmy Carter had made the center of his public works policy. After it passed, Carter tearfully decided not to veto the bill, and called to apologize to us. "I can't beat it. The subcommittee chairman [of the pork committee] is insisting on this override." (Can you imagine? This was the [President of the United States].)

Did we yield? No, we then brought a lawsuit based on the desecration of the valley's historic and sacred Indian grounds, based on the Native American Religious Freedom Act, but that didn't work either.[21]

At the end, the question is whether what we did then was: (1) worthwhile; and (2) relevant to what environmental law does today. At some level our snail darter litigation was a disaster for all [of] you who think of yourselves as environmentalists. Mention the snail darter, and America laughs. It's a classic deprecation. David and Goliath, but in this David and Goliath story, the little one is not perceived as a hero but rather as an anachronistic technicality that the environmentalists hypocritically used to block human progress. Although we continually tried to say that in this as in most environmental cases, good ecology is good economics, the message just didn't get across. So the press is always an important part of our shared stories as well.

Drawing upon our particular experiences, here are some of the elements that seem to be required in order for the citizen-litigation function to play a successful societal role:

> A fairly clear strict statutory rule, defining clear unambiguous violations that can be litigated by citizens with limited resources in the relatively crude forum of a court.
>
> Regulatory agencies that are ultimately relatively amenable to evolutionary growth so as to assimilate additional regulatory mandates.
>
> A judiciary that is sufficiently unpoliticized to

18. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

19. Given federal inefficiency, they did not quite make good on that threat, but almost.

20. Charles Schultz, Chairman, Council on Economic Advisers, Endangered Species Committee, Tellico Dam and Reservoir Project, 25-26 (Jan. 23, 1979) (unpublished transcript, on file with author).

21. Sequoyah v. Tennessee Valley Auth., 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

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be willing to scrutinize establishment positions and tolerate citizen law enforcement initiatives that challenge the political and economic insiders' status quo. (The federal courts, unfortunately, have, ever since the Meese-Sununu years, been extraordinarily politicized with agenda-driven nominations.)

A press that is competent and committed to delving into the true merits of public interest issues.

Citizens who organize, meet, and hang out together in networks in the grass-roots heartland as well as in Washington, D.C.

A multicentric system in which citizen groups outside government and business have the capability to leverage their way into governmental decisionmaking processes—not the old style bipolar system that essentially relies on government and its agencies to monitor and counterbalance market excesses.

In terms of democratic pluralism, our litigation showed how a ragtag group of low-level citizens could raise an issue to the highest level of national debate. We had a clear, crisp, stark statutory violation. With that, you can hope to bring a citizen enforcement action that did not require a lot of subtle proofs and subjective balancings of the violation, and money. (This was no Bruce Terris case, where he had $2.8 million to spend fighting the *Laidlaw* case! We sold souvenirs to finance our suit. We sold these lithograph prints of the darter for 16 bucks, and darter tee-shirts for 11. . . . It seems that citizen suits and tee-shirts go together. I wore one under my starched white shirt in the Court and so, I'm told, did Justice William J. Brennan, under his robe during that oral argument. So we were brothers, he and I, next to the skin.)

Is this story from the past, and many of the other narratives you'll hear in this symposium, a sign of what was and is no more, or is it still relevant to the present and future? What has been called the first generation of environmental law definitely followed a common model—citizen activists going to courts [and into administrative tribunals] to force various environmental protection considerations into the way the structures of our government and our marketplace economy do business—and that model from the 1970s may have some drawbacks as a permanent general prescription for societal governance, or it may be far more relevant than some modern revisionists would believe.

Without the classic campaigns of citizen organizations bringing lawsuits based initially on common law and then joined by the parade of environmental statutes promulgated starting in 1970, environmental law would almost surely have been a flash-in-the-pan, a public policy fad that petered away when the next fad came along to seize the media and public imagination.

And the statutes which were the basis of the first wave of citizen lawsuits, as I have noted, had pretty clear, sharp, enforceable standards that defined violations simply enough that citizens could pin them down in court. Stark simple standards can easily be criticized as extreme, inflexible, unsubtle—which leads to calls, some sincere and some selfservingly disingenuous, to modify the standards to make them "more reasonable." But as they are impregnated with subjective discretion, statutory mandates are likely to lose realistic enforceability. A strict, clear, statutory prohibition was necessary for us in the darter litigation, and those are sort of disappearing lately, merged into subjective administrative balancings as part of a continuing effort to cut back on citizen enforceability for environmental laws.

Our endangered species litigation helped forge a precedent for citizen enforcement, but may also have helped instigate the antiregulatory bloc's subsequent machinations on access to court that may well marginalize future citizen enforcements.

There were other negative characterizations that flowed from our ESA enforcement effort, like the "hypocritical-activists" rap that we passed onto many of you. As Justice Warren Burger said about the snail darter plaintiffs: "I'm sure that they just don't want this project. . . . The snail darter was discovered, and became a handy handle to hold onto." Well, in truth we cared deeply about the fish, as well as the demerits of the dam. There were quasi-religious reasons for bringing the case, but clearly the fate of the endangered species was critically important for practical leverage reasons as well. Remember what old Asa McCall had said at that meeting at old Fort Loudon. . . . We surely would have liked to base our suit straightforwardly on a statute that went straight to the project's merits, but up to this point Congress has not passed a "Prevention of Destructively Wasteful Federal Projects Act," and it is quite unlikely ever to do so! We would have been delighted to use it, had it been available. But environmentalists then and subsequently have been tarred with the brush of opportunistic hypocrisy for their pragmatic mixes of goals and tools.

A more sophisticated rap was that grassroots groups like us in Tennessee were "loose cannons" demonstrating the random destructiveness that uncoordinated citizens can wreak on a carefully shepherded conservation law. The Washington environmental groups shuddered as we approached. Citizens are unguided missiles. Under the citizen suit provisions of American environmental laws, we had the ability to decide on our own that this was something we cared deeply about, and go ahead and do it. This unruly independence is indeed not always a good thing, I'll admit, but we could not back away. We told ourselves there was a risk to larger principles, but we had the facts on our side. We had the law. We had the economics. We had all the merits on our side, not only in terms of the ESA but on the entire common sense public natural resources economics of the case. If we don't do this, we said to each other, how could we look into the eyes of our grandchildren and say: "Yes, there's another muddy lake, river gone, ecosystem trashed, 300 farms wiped out, a dozen Cherokee historic sites . . . and we could have stopped it, but we didn't try." Yet we did not succeed, and our hegira may indeed have harmed the environmental protection movement we cared deeply about. The unpredictability of citizen plaintiffs is another facet of the problem of unruly environmental democracy.

On the other hand, amateurism has its virtues as well. Our litigation certainly reflected some of the pleasures of working in grass-roots groups. We became a coalition of intensely interdependent citizens. We bonded, meeting many evenings every month in the flower club lady's front living room. Together we would meet and conspire. Together a group of us would go up to Washington every spring for the citizen damfighters conference. People came there from all over the country, little groups of people who were doing the same kind of activism, networking, and we would get to-

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gether and we would trade strategies and all sorts of data and contacts. It's a bit different today. Bruce just told us that local chapters of Friends of the Earth didn't automatically rise up to make his *Laidlaw* case happen. More and more, citizen litigation is being brought by the pros, by the nongovernmental organizations (NGOs). I don't see the citizen grassroots activism that I saw back in those days. *Bowling Alone*[*: The Collapse and Revival of American Community*], the book by Robert Putnam,[22] and *Diminished Democracy: From Membership to Management in American Civic Life*, by Theda Skocpol,[23] describe this trend. It would be good to see environmentalism begin to instigate a return to that civic neighborliness that characterized so many of our earlier environmental battles.

In today's circumstances should we now—as a number of intelligent people argue—be accommodating environmental law to a "second generation," a "business-government *partnership*" approach to environmental protection and societal governance? Should we be designing statutory standards that are more "eco-pragmatic," seeking the "reasonable middle" rather than maintaining the watchful stance of citizens holding government and industry to public civic values, and often using the leverage of crude, blunt "extreme" statutory standards? A corollary argument is whether we should now likewise abjure emotional media coverage of environmental harms, shifting to a more measured temperate academic public discourse in trying to communicate our environmental protection message to the public. Prof. Dan Tarlock has argued that the first generation of environmental law—what he calls "rule of law litigation"—may now be insufficient, and environmental protection must now capitalize on the world of "deal-making" as pioneered by the ESA's Industrial Toxics Project program.[24]

The danger of such positions is that they overlook the consistent political realities in our modern industrial society, where contending forces pose constant tension between the civic public interest and the specialized focused interests of the industrial-commercial marketplace to override environmental values which are diffuse, public, often nonmarketized, and erode the maximal returns that can be realized in the short term between regulated and unregulated activity.

One lesson from the 1970s that we are still relearning this year, this week, is that you cannot base a national regulatory regime on the wistful disingenuous premise that the powerful players in the political-economic marketplace will be significantly motivated by civic impulses to achieve the overall public good, instead of presuming that what's good for each player is what's good for the society. "Partnership"—the theory that government can rely on the power players in the industrial and commercial marketplace to work toward the public's best interests—is a fool's paradise unless the governmental camp sets and holds to standards dictated by the *public's* interest. Any lingering belief that the powerful structures of American industry and commerce had learned their lessons about environmental citizenship, voluntarily incorporating environmental civics into the core of their business plans, should have been torpedoed by the Reagan years, the Contract With America years, when industry took over the 104th Republican Congress and assaulted environmental laws across the board, and now with the Bush putsch, as industry once again moves to overthrow the structure of environmental protections built up so painfully over the years.

We need meaningful multicentrism, so that voices from outside the bipolar alliance of government and business will play a meaningful role in societal governance. And how can you assure that nonmarketized and long-term civic values will be heard within the processes of government and business that are so easily dominated by short-term profit and power maximization? What gives leverage to the voice of citizen groups speaking for civic values and sustainability in the quality of life for individuals and the society? My realistic answer is that the inside players accommodate to the voices of civic responsibility when they fear what will happen when they don't. And that fear comes primarily from two sources, I think, from how the inside players can be hurt by citizens in court, and how they can be hurt in the glare of media. Both are recognized as strategically important forums, witness the fact that the antienvironmental forces have spent so much time blunting the efficacy of both.

It is important that we strive to keep the pluralistic multicentrism of the 1960s alive. For most of its prior history, American government was just a bipolar proposition: the dynamics of the marketplace ran the economy and most aspects of daily life, and regulatory agencies were delegated the job of protecting all of us against the excesses where the market failed to provide civic necessities. What the 1960s (Woodstock, the greatest generation in the history of the world) did for civilization was shift from the bipolar model to multicentrism. Citizen groups should be able to play an integral role in societal governance. Dr. Martin Luther King Jr. bringing the civil rights actions citizen suits, Ralph Nader's consumerism, and then the parade of environmental statutes, each with its provisions for citizen litigation, and attorney and expert witness fee provisions, all these were crucial steps away from a more estranged system (to which we seem now to be returning) in which we are asked instead to rely on agency officials' discretion. How much protection, for instance, should we now be giving endangered species under an incidental take plan?[25] Well, it's completely up to the Secretary and unenforceable by members of the public as third-party beneficiaries.

22. Robert D. Putnam, Bowling Alone: The Collapse and Revival of American Community (2000).

23. Theda Skocpol, Diminished Democracy: From Membership to Management in American Civic Life (2003).

24. Dan Tarlock calls for flexible, adaptive management structures, saying the future is likely to be based more on "contracts," meaning negotiated arrangements for applying societal goals flexibly, rather than on fixed "rules." I would add the corollary that if we are to move away from clear crisp rules to a process of subjective, discretionary accommodations tailored to changing circumstances, we better have a potent reinforcement mechanism to survive the realities of political combat, where marketplace forces are, understandably, constantly trying to lessen the civic constraints on themselves. Public interest environmental lawyers must be acutely aware of the real political context. Given the fundamental political realities of modern government, open-ended adaptive regulatory systems managed via agency discretion will be a prescription for disaster unless, and only unless, such flexible, adaptive "contracting" processes guarantee active multicentric participation in both the formulation and the enforcement of their negotiated standards.

25. ESA §10 provides for exceptions to the ESA where conservation plans, approved by the Secretary of Commerce with indefinite substantive standards, can form the basis for actions which kill endangered species, and an equivalent amendment allows federal agency actions under the same or lesser constraints.

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But such moves to assert enhanced administrative discretion as an "improvement" upon the crudities and inefficiencies of citizen interventions in the legal system cut out something important. When you cut the public out of active, structural civic roles, when you dilute or eliminate the practical ability of citizens to enforce the laws, you diminish an important civic societal function.

This, I suppose, is just another way of saying that what we are talking about today may have a lot to do with litigation techniques and arcane doctrine, as well as an appreciation of beautiful places, precious resources, and solid environmental analysis, but ultimately it reaches much higher. Because ultimately environmentalism is another word for democracy.

PROFESSOR POWERS: It is a pleasure being on a panel with those who were at the forefront of some of the early environmental battles. We are a little grayer, now, perhaps a little weightier than we might have once been, but I hope that we haven't lost the passion for the cause. We do get involved in other things that are very important. We have to worry about whether our students are going to pass the bar. We also have to worry about *U.S. News & World Report* and whether we are going to be able to raise our standings or hold our standings. There are many other important matters we worry about on a regular basis—faculty parking takes up a lot of time. So it's a real pleasure to get back to talking about the issues that we have cared about for so long.

I was asked to reflect on *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd*.[26] Not the analytical problems that arise when you have the same factual predicate for standing, subject matter jurisdiction and your cause of action, which you can read about,[27] but a more contextual discussion, including some of the matters that do not necessarily appear in the record.

I have been living with *Gwaltney* since 1984, when the case was filed. This presentation gave me an opportunity to plow through some dusty boxes that have been sitting up on top of one of my shelves in my office. I rescued them a few years back when the Chesapeake Bay Foundation (CBF) was moving offices and someone called me up to say: "We've got all these old boxes in the garage. Can we pitch them?" "No, you can't," I replied. "They are history. Send them to me and I'll take care of them." I have been taking care of them by noticing every now and then that they are up on the top of my shelf, and thinking that one of these days I should catalog them. So I went back and took a look, and it really was a walk through history. What I'd like to do is to give you some sense, first of all, of the tenor of the times and the legal situation in which we found ourselves, and then some of the people, the players who were involved, the issues as we saw them, and a little factual background, about the company. So let me start by reminding you of the times.

I had been at the [U.S. Department of Justice (DOJ)] at the end of the Carter Administration. In fact, Jim Moorman, who was mentioned earlier as the president of the Sierra Club, had become the assistant attorney general in charge of the Lands Division. But after the 1980 election the Reagan Administration came in, and I joined the [CBF] in 1984. At that time the *Gwaltney* case had already been filed. In fact, summary judgment on liability had been entered a short time before.

There were very few environmental lawyers at that time. I believe I probably could have named you every environmental lawyer in the country during that period. But environmental cases were beginning to be filed and there was a great deal of work going on. Citizen suits, especially under the CWA, were viewed as a relatively straightforward means of attacking many environmental problems. As the court noted in *Weyerhauser Co. v. Costle*.[28]

> Congress intended that the [CWA] be enforceable in simple proceedings suitable for summary judgment. In particular, Congress imposed monitoring and reporting requirements in order to avoid the necessity of lengthy fact-finding, of investigations, and negotiations at the time of enforcement. Enforcement of the Act should be based on a relatively narrow fact situation requiring a minimum of discretionary decisionmaking or delay. The same concern for expediency applies whether the enforcer is a citizen or a branch of government.[29]

Short litigation? Some of these citizen suits dragged on for how many years? The issues have become incredibly complicated. But at the time, those of us who were beginning to litigate these citizen suits felt that this was, in fact, the standard and that citizens stood in the shoes of government. If the government could bring the suit, then we could bring it. There was nothing to indicate that there should be any difference between a citizen enforcer and the government. Now, there was this one outlying case, *Hamker v. Diamond Shamrock Chemical Co.*,[30] from the [U.S. Court of Appeals for the Fifth Circuit], but that was a case in which there had been an oil spill and the citizens had really wanted damages; they had used their CWA litigation in order to get their damages action into a federal court. We thought that decision was an outlier, because the Fifth Circuit had said in that case that if it was a past violation, the citizens couldn't sue. We all thought that that was really an erroneous interpretation of the statute.

A little more about the tenor of the times. Of course, there was a great distrust of the government during the Reagan Administration, during the reign of Anne Gorsuch Burford, and citizens, including organized groups such as the NRDC, began to believe that there had to be enforcement by the citizens, not just of statutory deadlines, not just suits against the agencies, but there had to be enforcement against the actual dischargers. So the NRDC put together its Clean Water Project. It began to partner with groups, NGOs around the country, to find appropriate litigation and to bring suits against polluters. The [CBF] worked with NRDC to identify cases on the Chesapeake Bay that might be worthy of litigation. This happened before I joined CBF, but essentially what CBF and the NRDC did was to send people out to look at

26. 611 F. Supp. 1542, 15 ELR 20663 (E.D. Va. 1985), *aff'd*, 791 F.2d 304, 16 ELR 20636 (4th Cir. 1986), *vacated & remanded sub nom.* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 18 ELR 20142 (1987), *on remand sub nom.* Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 844 F.2d 170, 18 ELR 20941 (4th Cir. 1988), *penalty reinstated on remand sub nom.* Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 688 F. Supp. 1078, 18 ELR 21275 (E.D. Va. 1988), *aff'd in part sub nom.* Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 20 ELR 20341 (4th Cir. 1989).

27. Ann Powers, Gwaltney of Smithfield *Revisited*, 23 Wm. & Mary Envtl. L. & Pol'y Rev. 557 (1999).

28. 590 F.2d 1011, 9 ELR 20284 (D.C. Cir. 1978).

29. *Id.*

30. 756 F.2d 392, 15 ELR 20385 (5th Cir. 1985).

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discharge monitoring reports, in order to determine who was violating their permits or discharging without permits, who wasn't being prosecuted. What they found was that the permits were written so poorly in many instances that industry did not have to do much to stay in compliance; that, in fact, the system itself, the underlying permits were a tremendous problem.

But even at that, there were some companies that, even with very loose permits, had rather egregious discharge records. So CBF and the NRDC selected six companies to be the focus of enforcement actions. One of them, of course, was Gwaltney. We also selected her sister company, Smithfield Packing, both of which were subsidiaries of Smithfield Foods. Bethlehem Steel in Baltimore was another one, and American Recovery, to whom we sent 60-day notice letters. Of course, back then you really didn't have to worry about whether you had forgotten to put the phone number of your attorney on your notice letter as you might now. The letters were pretty straightforward. They had not yet engendered much litigation. As a result of the CBF/NRDC notice letters the state took action against a couple of the dischargers, but we wound up in litigation with Gwaltney, with American Recovery in Baltimore, a waste recovery entity, and Bethlehem Steel, one of the major employers in Baltimore.[31]

As an aside, I might mention that at the time the attorney from a major Baltimore law firm told us that no court in Baltimore would ever rule against Bethlehem Steel; he said that just wasn't going to happen. But a couple years later, and many court appearances later, we got some nice opinions against Bethlehem Steel in that case.

But the *Gwaltney* case was an interesting one because the state had been keeping an eye on the company. Smithfield, Virginia, the site of the facility, has been famous for its hams since the 1700s and there have been meat-processing facilities there for many years. Smithfield Foods acquired Gwaltney in 1981 from ITT Continental Baking. At the time the facility had already had a number of fairly serious CWA discharge violations, and ITT Continental Baking, had done very little to get the plant into shape. At one point, we considered trying to go back and bring suit against ITT Continental. It was almost impossible to figure out at that point who we could possibly sue given the complicated nature of the holding company. Since it would have only have been a couple of years of violations and they were old and the rest were barred by the statute of limitation, we didn't proceed against ITT Continental.

Smithfield was a small town in what was then a fairly rural area of Virginia. The plant was right on a river called the Pagan River and one of our attorneys, got great glee out of talking about the company putting "pig in the Pagan." He thought that was a great line.

The whole Smithfield community was geared around these two meat-packing plants. Gwaltney was processing 15,000 hogs a week. Smithfield across the road was also processing a very substantial number of hogs. If you haven't been to a hog-holding facility or a packing plant, you don't really want to go. The company prided itself on using every piece of the hog it could, but still, you knew when you got near the plant. I tried to avoid as much as I could the processing line because it is not a pretty picture.

Much of the waste from that kind of processing facility is organic waste. It's the fecal matter from the hogs that are slaughtered and the waste from the carcasses. So it's largely organic and the way to process it, for the most part, is the same process used at a sewage treatment plant. Gwaltney had lagoons for the biological degradation of the wastes. When it finished, it chlorinated the wastewater and discharged it into the river.

Now, it was well beyond the point where, years before, they had actually dumped blood and carcasses in the river. So the pollutants going in the river at this point were, for the most part, excess nitrogen, excess phosphorous. These are oxygen-demanding wastes. The facility essentially used very basic technologies. When Gwaltney bought the plant in 1981, they did bring in a consultant to tell them what could be done with the plant and what processes needed to be changed. They then proceeded to ignore the recommendations of the consultant for the next several years. Even though the state had been talking to Gwaltney, the company had not come into compliance.

When we brought the suit, there was outrage on the part of the company officials. I think that this was a hallmark of many of the early citizen suit cases—industry accepted it when the government sued because that's what the government was supposed to do, and industry would usually settle the case. But when the citizens came in, that was an outrage. This was especially true in the *Gwaltney* case since the state had been "working" with Gwaltney—although as one of my colleagues described it, Virginia's enforcement posture was "supine." The state did finally bring a suit in state court against Gwaltney once we had sued, and that suit was eventually nonsuited after we were finished. They also sued Smithfield Packing, against whom we filed a 60-day notice letter, and we intervened in that case. Eventually they got a tremendous penalty, all of $40,000, and the state officials were very proud of their efforts.

Despite the caption of our lawsuit, NRDC was a full partner and totally involved. They paid for some of the experts in the beginning, Dr. Bruce Bell, in particular, who we are still using in some of our environmental litigation cases. The attorneys were two CBF attorneys, Jeter "Bud" Watson and Scott Burns, along with an NRDC attorney, James Thornton, and later Jim Simon (who later went on to work at the [DOJ]). The litigation was before the district court on several occasions, the [U.S. Court of Appeals for the Fourth Circuit] three times, and the Court. Justice Thurgood Marshall, writing for the Court, didn't do us any favors, ruling as you know that there needed to be an ongoing violation.

There had been a split in the circuits—the Fourth Circuit opinion in *Gwaltney* and the *Hamker* case from the Fifth Circuit. When *Gwaltney* first came up on a petition for certiorari, the Justices voted not to take the case.

A short time after that a third case was decided by the [U.S. Court of Appeals for the] First Circuit, *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*,[32] in which the court said that a good-faith allegation of a continuing threat of violations would support jurisdiction. Based on that, Justice Byron R. White asked his colleagues to reconsider the denial of certiorari. Justice Lewis F. Powell Jr. changed his vote and the Court took the case.

31. *See* Chesapeake Bay Found. v. American Recovery Co., 769 F.2d 207, 16 ELR 20056 (4th Cir. 1985); Chesapeake Bay Found. v. Bethlehem Steel Corp., 652 F. Supp. 620, 17 ELR 20623 (D. Md. 1987).

32. 807 F.2d 1089, 17 ELR 20374 (1st Cir. 1986).

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When it was over with, we declared victory. We said that the Court had clearly affirmed that citizens have a right to bring such cases, and only those that seek to address violations that are totally past are barred. But other than that, we had a clear victory. The other side, of course, also declared victory, and there were dueling articles and presentations at symposia. But over time, obviously, we have seen many complications arise for citizen litigants from the Court's decision.

PROFESSOR AXLINE: I always start off talking about suits by recounting a story that Newt Minnow, the chair of the Federal Communications Commission during the Kennedy Administration, told after returning from a trip to Europe. His story described the legal regimes in four European countries in the following way: he said that in Germany, everything is prohibited except that which is permitted. In France, everything is permitted except that which is prohibited. In Russia, everything is prohibited including that which is permitted. And in Italy, everything is permitted especially that which is prohibited. The reason I tell that story is because it doesn't matter what the law says unless it is enforced.

The motto of the Western Environmental Law Center is enforcement of the law is what really counts. I took that line from a dissent written by Justice [William J.] Brennan in a case called *Evans v. Jeff D.*,[33] in which a legal aide attorney who had worked for eight years to represent a client on a contingency basis had been given an offer for the client by the defendant that was contingent upon the attorney waiving the right to attorney[s] fees. The attorney did the ethical thing and waived the right to attorney[s] fees, and then challenged the ethics of that offer. The Court ruled that it was ethical for the defendants to make such an offer, which gave the client everything that it was asking for except contingent attorney[s] fees. Justice Brennan, I thought very wisely, pointed out that there isn't going to be any enforcement in the private sector of environmental laws without the right to attorney[s] fees.

I'm going to talk a little bit about the north[ern] spotted owl litigation, which is something that I am still engaged in. I've been working on that litigation for 21 years. It's a remarkable example of persistence on both sides, the government and the environmental community. But in the process of doing that, I want to address some unexamined assumptions. Unintended consequences can be either good or bad. But unexamined assumptions are almost always trouble. So I want to identify some unexamined assumptions that I think we all collectively, those of us concerned about citizen suits, need to think about and expose to the public.

The first one is that the government will enforce the law. That is an assumption the general public has that is not necessarily true. Another is that all violations of environmental laws are prosecuted. Nobody ever attempts to quantify the number of violations that are not brought to court. I was prosecuting a case against the Animal Plant Health Inspection Service once on behalf of the environmental community and the agricultural community, who were concerned that raw logs were being imported into this country without proper inspection to see if pests were on them. The concern in that community was that pests would get in and destroy crops and our natural forests. So we had an unusual coalition in that case. The concern was that you could only inspect a very small percentage of the logs that were coming in. So I was trying to collect for our case information on the extent of noncompliance generally that happens in the real world with respect to environmental laws. I called Steve Herman, who was the head of enforcement for [the U.S. Environmental Protection Agency (EPA)] at the time, and said: "Do you have any statistics on the percentage of compliance in the regulated community with environmental laws?" His response was: "No."

So even though we're talking about, in the case of *Hill*, an example of supposedly outrageous overenforcement by the environmental community of environmental law, such examples actually are minuscule compared to the amount of environmental damage that's being done through noncompliance.

A third unexamined assumption, which I'll discuss in some detail, is that science is objective outside the courtroom, but becomes corrupted when it's brought into the courtroom. The opposite is true. Science is not objective outside the courtroom. It only gets revealed for what it truly is once it's examined through the adversarial process.

A fourth unexamined assumption that I just jotted down listening to Bruce Terris is that standing is a constitutional requirement. I completely agree with your viewpoint, Bruce. You don't find standing described in Article III of the Constitution. I've said in my administrative law class for years, show me where in Article III there's anything about standing. If you examine the edifice that has been constructed by Justice Scalia and other members of the Court requiring that citizens establish standing before they can even get through the courthouse door, you don't find any constitutional underpinning. The reason for the unexamined requirement is apparently that unless you mandate standing, the courts are going to be flooded with do-good environmental litigators who have nothing better to do with their time than spend 20 years trying to enforce environmental laws. There is no empirical evidence to support this assumption, which is among most restrictive of assumptions that the Court has adopted. Look at other countries, such as Australia, that don't have standing requirements; somebody in Perth can object to the destruction of an historic building in Sydney, even if they've never been to Sydney, yet the courts are hardly flooded with do-good environmental litigators.

Finally, the assumption that economic analysis accomplishes anything really needs to be examined. Somebody who has done some good work on this is Jack Cassidy, who used to be a business editor for the *Washington Post*. He has written a couple of very good articles on this subject. As you know, the forces of darkness use economic analysis to try to undermine a lot of work that citizens are doing to enforce environmental laws. Cassidy wrote an article called *The Decline of Economics*, in which he examined the state of microeconomics as promoted by the Chicago school. He had read an article in the *Economic Review* that had been written by microeconomists who examined the nature of decisionmaking on *The Price Is Right* television program and tried to use it to explain game theory and its utility in predicting what's going to happen in the real world and how people make their decisions. The conclusion of the article was that by applying game theory and economic analysis to

33. 475 U.S. 717 (1986).

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The Price Is Right, the authors were unable to predict the behavior of contestants.

When I teach administrative law, during my first class of the semester, I put two columns up on the board. One is "Trust," and one is "Don't Trust." I ask my students to give me reasons why you would trust agencies to do what the law requires them to do and to give me reasons why you wouldn't trust agencies to do what the law requires them to do. Consistently, the list under "Don't Trust" is much, much longer than the reasons under "Trust." After we go through that exercise, I then ask them the following question: "Who enforces NEPA?" The answer is usually, well, the government. Then I say: "Well, who is regulated by NEPA?" They stop and think about that for a minute. Well, the answer is: The government. So the government is supposed to enforce the law against itself. Who are the attorneys for the government? The answer is the [DOJ]. Then I tell them about the unitary executive theory, which was developed by the [DOJ], to the effect that the executive branch of government is one big happy family, and the [DOJ] is constitutionally incapable of bringing a case in federal court against any federal agency because it can't present a case or controversy since it would just be suing itself and that wouldn't be recognized. So there can be no enforcement of NEPA without citizen suits. Only citizens can enforce that law.

The same is true with the Freedom of Information Act, another relatively unique law whose purpose is to regulate the conduct of the federal government.

I try to make this point whenever I can. These two laws are unique in that they are Congress, not asking federal agencies to join hands and regulate the private sector with them, but rather directly regulating the conduct of federal agencies because Congress doesn't trust the agencies to consider environmental factors and doesn't trust the agencies to release documents when they are sought by citizens, and rightly so. So only citizens can enforce those laws and they don't get enforced in the absence of citizens.

Let me now turn to the spotted owl litigation starting with *Portland Audubon Society v. Hodel*,[34] which was filed on October 19, 1987, a day in the U.S. attorney's office called Black Monday, not just because the stock market crashed that day, but because that's the day this lawsuit was filed, running up to the present time. *Portland Audubon* and its progeny unfortunately represent only the tip of the iceberg in terms of the litigation that has been required to try to force the U.S. Forest Service [(Forest Service)] and the Bureau of Land Management (BLM) to simply comply with the law. It just made me tired just thinking of the number of years that I and others have spent trying to force the agencies to acknowledge the simple fact that the northern spotted owl requires old growth forest to survive and deserves to be protected under the ESA, NEPA, and the National Forest Management Act.[35]

The northern spotted owl is a very interesting bird. The first time I saw one I took a group of students and went with a Forest Service biologist out to find a radio-collared owl. We were tramping through the forest, this silent magnificent cathedral-like old growth forest with towering Douglas firs and huge ferns, very prehistoric seeming. The biologist had a little tracking device and as we got closer, it would beep louder. There were maybe six of us and we were all talking amongst ourselves, but as we got closer to the owl, the conversation started to get quieter and the biologist looked at all of us and said: "You know, owls are completely unafraid of humans because they never see them, so you don't really have to lower your voices." And we couldn't do it. We had to lower our voices more and more until finally we got to where the owl was perched in a Douglas fir tree. We sat down to it and were silent for about 10 minutes and started talking in whispers; over time, the conversations grew louder. We sat there for an hour watching the bird, while it watched us. After about an hour it began to dawn on me, these owls live 80 years and this bird was going to spend 80 years out in an old grove forest with no sound, just being unless, of course, that old growth forest was destroyed as all old growth forests were being destroyed at the time.

I want to talk about the unexamined assumption that science is objective outside the courtroom and is corrupted when it gets into the courtroom for a minute. There are two aspects of science that I think are relevant in citizen suits. The first is that a lot of bad science is produced outside the courtroom. There is no reason to assume that scientists are any more objective or neutral than any other profession. If you want to read some very good examinations of the sources of bias in the scientific community, I'd recommend William Broad's *Betrayers of the Truth*,[36] Paul Ehrlich's *Betrayal of Science and Reason*,[37] and Marc Lappe's *Chemical Deception*.[38]

An increasing number of medical and research institutions are starting to require academics and consultants to disclose potential conflicts of interest and where their sources of funding come from. The results are fairly shocking. Currently only 16% of the top academic science journals in the country require any disclosure of conflict of interest among contributors, and only 1% of the authors that have contributed to those articles have ever disclosed a financial conflict of interest. So because of corporate funding, government funding that comes with political pressure, and the need to go to the private sector for funding, the assumption that good science happens outside the courtroom is simply not true.

The second thing that happens to science is that it is suppressed. Good science is suppressed outside the courtroom.

34. 19 ELR 20366 (D. Or. 1988), *defendant's motion to dismiss granted*, 18 ELR 21210 (D. Or. 1988), *decision at 18 ELR 21210 rev'd & remanded, decision at 19 ELR 20366 aff'd*, 866 F.2d 302, 19 ELR 20367 (9th Cir. 1989), *defendant's motion for summary judgment granted on remand sub nom*. Portland Audubon Soc'y v. Lujan, 712 F. Supp. 1456, 19 ELR 21230 (D. Or. 1989), *aff'd in part, rev'd in part sub nom*. Portland Audubon Soc'y v. Lujan, 884 F.2d 1233, 19 ELR 21378 (9th Cir. 1989), *defendant's motion to dismiss as moot granted on remand sub nom*. Portland Audubon Soc'y v. Lujan, 21 ELR 20018 (D. Or. 1989), *rev'd & remanded sub nom*. Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 21 ELR 20019 (9th Cir. 1990), *on remand sub nom*. Portland Audubon Soc'y v. Lujan, 21 ELR 21341 (D. Or. 1991), *aff'd in part, rev'd in part sub nom*. Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 22 ELR 20372 (9th Cir. 1991), *preliminary injunction sub nom*. Portland Audubon Soc'y v. Lujan, 784 F. Supp. 786, 22 ELR 20889 (D. Or. 1992), *aff'd sub nom*. Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 23 ELR 21142 (9th Cir. 1993).

35. 16 U.S.C. §§1600-1614, ELR STAT. NFMA §§2-16.

36. WILLIAM J. BROAD & NICHOLAS J. WADE, BETRAYERS OF THE TRUTH (reprint 1983).

37. PAUL R. EHRLICH & ANNE H. EHRLICH, BETRAYAL OF SCIENCE AND REASON: HOW ANTI-ENVIRONMENTAL RHETORIC THREATENS OUR FUTURE (reprint 1998).

38. MARK LAPPE ET AL., CHEMICAL DECEPTION: THE TOXIC THREAT TO HEALTH AND THE ENVIRONMENT (1991).

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If you are not willing to come up with tainted results, then the results that you do come up with are often suppressed. The spotted owl case is the prime example of where that happened. Starting in 1973, scientists within the BLM and the Forest Service started to tell managers that the northern spotted owl was in danger of extinction and required old growth habitat to survive. The government went to a biologist named Mike Soulet, a conservation biologist, and asked him to determine the number of owls that would need to be protected in order to ensure the survival of the species. Mike refused to do it. He said he would have to conduct years of research in order to do so. But they said: "No, we really want a number just for a horseback analysis purpose[s]. We promise we won't use it. Can you give us any kind of a number?" Mike said: "Well, all right." After several months of pressure, he said: "Based on fruit flies in a bottle, I would say 400 pairs of owl." He just used a very simple analysis without any on-the-ground research.

The Forest Service took that number and promoted it as the truth and said we do not need to protect any more spotted owls than 400. When we started questioning that number, we had a hard time tracking down Mr. Soulet. We finally did find him and asked him about the number and he said there was no validity to it, that it had not been produced scientifically. We started talking to a young associate professor at the University of Chicago named Russ Landy, who subsequently received a MacArthur "genius" award for the work that he did on our behalf in the spotted owl litigation, and he did the first ever true metapopulation analysis of the northern spotted owl to determine how many owls would be necessary to ensure the survival of the species. That analysis showed that you would have to protect *all* the remaining spotted owl pairs, roughly 3,000 of them, and even then, there was a high likelihood that the species was going to become extinct. That analysis was never publicly revealed or promoted until we were able to use it in the courtroom in the litigation in that case.

So starting in 1973, when the Forest Service said that you could ensure the survival of the owl by protecting 400 pairs and giving each pair 300 acres of old growth to live on, progressing through at least nine major phases of litigation, we arrived at the place we are today. After the government lost in court every single one of these cases, President William [J.] Clinton convened a panel in Portland, Oregon, to come up with a final solution; he ended up deciding he was going to give a carte blanche to scientists, put them all in a suite of rooms to provide the best scientific opinion you can as to what's necessary to save the northern spotted owl. Those scientists—for the first time unhindered by political pressure or financial concerns—said that you need to set aside seven million acres of old growth, and even then you can't be sure that you are going to save the species. That was then adopted into a plan called the Northwest Forest Plan by the Clinton Administration, which is currently under attack by the Bush Administration, which is why I'm still litigating over spotted owls.

Zyg was pretty pessimistic about the likelihood of things improving in the future, but I'm not nearly as pessimistic as Zyg. Having lived through all of these battles and come out of them with the world even better than it was when we went into them, I'm just a hopeless optimist that we are going to be able to continue to do good work despite the current Administration. I was listening to the radio the other day, to a report on a scientist in Berkeley who was just sitting around her living room and heard a knock on the door, went to answer the door and opened it and there wasn't anybody there, but she looked down and there was a snail on the doorstep. She picked up the snail and threw it out in the yard and went back into the living room not thinking anything about it. Three years later she was in the living room reading the paper. There was another knock on the door. She went and opened it. Nobody was there, but she looked down and there was a snail again. She picked up the snail to start to throw it out in the yard and the snail goes: "What was that all about?" It's good to take the long-range perspective, so let's do that.

MR. BOOKBINDER: Some of my colleagues have already spoken about how they got into this business beginning with Bruce Terris talking about how he became an environmental lawyer, more or less by accident. I want to give my wife credit for getting me into environmental law. She was a mergers and acquisitions associate at Skadden Arps law firm in New York, but decided that she hated legal work and wanted to become a child psychologist. Her decision to completely switch careers and get her Ph.D. to do that led me to decide that I kind of liked law, I didn't want to get out of that, but what I really wanted to do was environmental work. So I left Wall Street.

Zyg coined the idea that the best sort of cases are the ones that heavily involve citizens and actually have the local activists on the ground doing and working. The small silver lining in the terrible cloud of standing that has hung over our heads is citizen involvement. Frequently you always need to gather up the declarations of citizens. One of the ways you empower people is to say, look, guy on that stream, "you're going to have a role in this case."

They reply: "What can I do?" "You're going to have to tell the court what the problem is. You've got to do it. I can't do that. I'm just a lawyer. I'm just going to stand here and write long briefs and use legal words. But you're the one who's going to have to tell the court why this is a bad thing. Because you're willing to do that, we can fix the problem." There is a wonderful feeling to work with people whose, in many cases, only experience with the judicial system was going down and pleading to a traffic ticket or some minor thing like that. To give them a chance to see that the legal system can work for themselves and that they can take part in a large federal lawsuit with dozens of lawyers all over the place, but that they are a necessary component to that. I think that's a small silver lining out of the entire standing mess.

I was asked to discuss TMDL litigation under the CWA. In the TMDL program, Congress sought to approach the problem of water pollution scientifically, declaring that we should look at a water body and at everything that's in there. If you are going to have a certain type of pollutant going into it, you are going to figure out how much of that pollutant you can put in the waterway before you start violating the water quality standards, before it gets too polluted to fish in, too polluted to swim in, too polluted to use as a drinking water source. The provision was written into the CWA and promptly went into a black hole. It just simply disappeared from environmental consciousness. There was one brief flash of TMDL litigation in the late 1980s-early 1990s, but otherwise it just disappeared completely into the great black hole.

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The issue in TMDL cases was: What did Congress intend? It says that the states shall come up with a list of all the waterways in their jurisdiction that aren't meeting water quality standards. They'll come up with this list, and for all the pollutants on that list in all those waterways, they are going to come up with the TMDLs. Then they are going to use those TMDLs to try to figure out how to clean up the waterways, whether it is through permitting or through other mechanisms. They are going to send this list to EPA and EPA is going to look at that list and approve it or disapprove it. If the state does a bad job, if the Administrator disapproves the list or the load, she shall not later than 30 days later come up with her own list of impaired waters or come up with her own TMDL.

What happens if the state doesn't do anything? That was the question being presented in dozens of cases being brought across the United States.[39] One after the other after the other, we would stand up in court and we'd say: "Look, clearly Congress said if the state does a bad job, EPA has to step in and fix it." The [DOJ] would say: "Well, Your Honor, it didn't say that if the state does absolutely nothing that EPA has to stand up, get involved, and come along and correct it." This was litigated in case after case, decision after decision across the United States in rather, kind of, in some sense, a waste of judicial resources. We had to litigate these lawsuits state by state because EPA would say to us: "We can't lean on the state to do these things until we get sued by you. So as soon as you sue us, then we can go to the state and say: 'Hey, you've got to start submitting these things to us.'"

So it became, in some sense, a real pattern. We would get to the point of EPA at times saying, okay, well, we really would appreciate a TMDL notice letter in this state, or a TMDL notice letter in this state because it is doing nothing and we need your help to force it. So there was a collaborative effort that went on well behind the scenes in the initiation of some TMDL litigation. Then we would run into the [DOJ], which would be busy saying: "Well, Congress never even intended that [the] EPA do anything even if the states did absolutely nothing."

One of the important lessons to be learned from TMDL litigation was how important individual judges can be. A good judge will move a TMDL case and make things happen; with other judges, the case can languish forever. In the Virginia TMDL case, which is the first one, I think, that Jim May and I did together, we had the Honorable T.S. Ellis III, in the [U.S. District Court for the] Eastern District of Virginia, which is also a place that has one of those infamous "rocket dockets." T.S. Ellis is also a man who believes in speed and getting things done. I remember early on in the litigation EPA had moved to dismiss. We'd won that. We had a conference in front of the judge. The judge said: "Okay, you have to answer the complaint now." The EPA said: "Yes, that's fine, but we'll need 60 days to do that," and this was a Friday conference. The judge said: "You've got till Wednesday." They said: "That's not reasonable." He said: "Be careful or I'll make it Tuesday." Things move along in Judge Ellis' courtroom.

There were, however, some downsides to being in Judge Ellis' courtroom. I remember once sitting at our counsel table. Jim was up at the mike speaking. Judge Ellis was responding and I started nodding going, yes, Judge Ellis understands it. And Judge Ellis tore into me and said: "Mr. Bookbinder, this court does not need your nod to confirm I'm correct. I, as the judge, know that I'm correct. If I see any more nodding out of you. . . ." I've never otherwise been reprimanded by a judge for simply nodding and agreeing with him. Things could get rough in Judge Ellis' courtroom, but he moved that case and it was only fear of what Judge Ellis was going to do to EPA and to the [DOJ] that enabled us to push that case forward.

The negotiations for that case under this pressure from Judge Ellis were fairly extraordinary. I remember one session that took place in Wilmington. The EPA lawyers came up from Washington. They came down from Philadelphia. We met here. We started negotiating, I think, at 10:00 in the morning. By around 11:00 that night we had already agreed that we'd have to literally keep on going. They were figuring out where they were going to sleep, things like that. I remember Jim and I hopped into his car and drove out to find food. We were so exhausted at that point we pulled into a Wendy's. We ordered at the microphone. We pulled up at the window. We paid our money. We were coming back to school, we were a couple miles closer to school and I said: "Hey, Jim, where's the food?" We'd left the food back at Wendy's, and we had to go back there and get it.

We worked until around 3:00 in the morning, at which point EPA cracked. We got a fabulous settlement out of them, the particular term of which was an EPA agreement that in writing they agreed that they would report to us as to whether eventually Virginia [national pollutant discharge elimination system (NPDES)] permits were going to be written in compliance, they would do a permit-by-permit analysis of whether their permits were actually going to be in compliance with TMDLs. That was a major victory, something that was so good at one point they wrote us a letter saying, when I tried to get this concession in another case, they wrote a letter saying: "You extracted that settlement from us under duress and we will never agree to those terms again."

So I think the key is, you know, around 3:00 in the morning, they'll crack. If you remember your Wendy's and you've got some caffeine going, you're going to be fine.

Another example of a good judge in a TMDL case was in a Missouri TMDL case. We had Judge Scott O. Wright from the Western District of Missouri there. Once again, the government moved to dismiss and said: "When the state does absolutely nothing for 30 years, EPA doesn't have to do anything." Judge Wright took their heads off in an opinion on a motion to dismiss and for the first time I saw a judge on his own raise Rule 11 of the Federal Rules of Civil Procedure, saying: "I don't even think the [DOJ's] pleadings of this motion is compliant with Rule 11." He concluded his opinion by saying: "I would strongly urge the government to find its way to the settlement table before I have to take matters further into my own hands." When you have an opinion like that from the judge, you get to the settlement table very quickly and you get a good settlement. We were lucky in those two particular cases. It doesn't always happen that way.

Looking back on the history of TMDL litigation, I'm not sure ultimately what we've accomplished. I think that's a bit of a bummer. We've run around the country, filed a lot of

39. For a discussion of the legislation, its history and the litigation that led to application of the requirement, see Oliver A. Houck, The Clean Water Act TMDL Program: Law, Policy, and Implementation (Envtl. L. Inst. 2d ed. 2002).

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suits, and certainly collected a lot of attorneys fees to subsidize our other work, which is good. But as the TMDLs have come out, when you have a consent decree requiring 10, 30, 50 TMDLs per state to come out each year, how good is the quality of these TMDLs? How much time and effort do you have and resources to review the TMDLs, to make sure they're good? In fact, TMDLs are being used by the agencies to do the wrong things. For instance, we now get the argument from agencies, well, hold it, we know we have an impaired river here, but until we do the TMDL, we're not going to do a damn thing about it. And see this permit for this factory? Well, because we don't have a TMDL, there's no use having a permit that requires meeting water quality standards in this river. We're just going to issue them any old thing.

So what we thought originally was going to be a very powerful sword to clean up the waterways in some cases has become a shield to protect industries as well as nonpoint sources from cleaning up. Another problem that's developed out of the TMDL litigation is the listing games. Before the advent of the TMDLs, the CWA lists of impaired waters, the §303(d) lists, didn't mean a damn thing because no one was actually doing TMDLs based on them. The lists were accurate. States would go around and say: "Yes, we have hundreds of impaired waters, hundreds of rivers and lakes and streams that aren't meeting water quality standards. Okay. Sue us." Well, eventually we started suing them. Now states are desperate to get water bodies off the list and they will do anything to do so because once they are on the list, then there are all these consent decrees that say they have to develop TMDLs. There is now a number scheme being played and now a whole second waive of litigation is going on as states figure out ways to not list waterways.

At least in the old days, we had accurate information and no means of cleaning up the waters. Now we may have a means of cleaning up the waters, but we have no idea what should or shouldn't be on the list. Florida is leading that game. Iowa is in it. The Mid-Atlantic Environmental Law Center is leading the charge now litigating with EPA over Florida's methodology. To give you an example, Florida came up with a methodology of saying we are going to assume everything's clean unless we get a lot of very recent data of at least X number of data points showing a certain amount of impairment. Of course, Florida then doesn't monitor the waters, so they don't have to put anything on the list. They ran this past EPA under the Clinton Administration and [the] EPA said: "Well, first of all, that's a huge change to water quality standards that we will never approve." Then George W. Bush got appointed [President of the United States] and EPA has changed, and Region 4 of EPA looked at the same plan from Florida and said: "Not only is that not a change in water quality standards so we don't have to review or approve or disapprove, but you should be commended for your innovative approach to this issue." We are now litigating as to whether this huge change is or is not a change to water quality standards that EPA has to approve or disapprove, and then when they approve it, we'll have to sue EPA again for doing something that's arbitrary and capricious, and we are in another long-term litigation fight that's going to go on state by state over the issue of how do you put things on waters that eventually you will develop TMDLs for.

The moral of the story is, as Mike Axline has found out with the spotted owl 20 some odd years later, it doesn't end with a victory. A victory just means your opponents will come up with new and interesting ways to try and stop you, and these things go on for a long, long time. Where they'll end in the TMDL situation, I don't know. I think a lot is going to be determined by the great listing questions and we'll be starting to see those decisions in the next two or three years.

PETER LEHNER: Citizen suits are perhaps the most important feature of federal environmental law. In many ways, they are one of the key differences between federal and state environmental law because despite many of our best efforts, there are very few effective citizen suit provisions at the state level that allow citizens to sue polluters directly for statutory violations. A few states have provisions applicable in special circumstances, but they are very rarely used. It is that difference, the availability of citizen enforcement, I suggest, that is, in large part, responsible for the fact that federal law very often is far more effective than state environmental law.

I'm going to discuss a slightly different angle on the subject, which is the use by governments of the federal citizen suit provisions, mostly under the CWA and the CAA. I'm going to describe two groups of these cases and point out some of their unique aspects.

Now, although we generally use the term "citizen suits," most statutes actually provide a cause of action to "persons," and state and local governments are included within the definition of the term. So state and local governments can, in fact, bring citizen suits. Unfortunately, however, they very rarely do. Now, I brought citizen suits on behalf of citizen organizations when I was at [the] NRDC, but I've also brought them on behalf of local governments when I was at the city of New York, and now on behalf of state governments at the state of New York. I begin by describing an earlier round of CWA citizen suits brought on behalf of the city of New York because these were in many ways what inspired the state's air pollution control litigation.

New York City gets its drinking water from a watershed the size of the state of Delaware. A series of about 13 reservoirs are fed by hundreds of streams which flow through thousands of acres of largely privately held land. This watershed is outside of the city. It's in upstate New York, and therefore, of course, outside the general regulatory jurisdiction of New York City. Within the watershed area are approximately 100 sewage treatment plants that discharge directly into the streams that feed the drinking water.

In the late 1980s, the city became aware of the growing threat to the water quality in the reservoirs. Because the New York City Department of Environmental Protection (NYCDEP) itself had a discharge monitoring program, we knew that these sewage treatment plants were part of the problem. Many of them were in very significant noncompliance with their water pollution permits under the State Pollutant Discharge Elimination System (SPDES) program. While a few citizen groups, such as [Hudson] Riverkeeper, brought a number of citizen suits against some of the largest violators, the vast majority of the violations were unknown because they weren't being reported, and permit provisions were certainly not being enforced.

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It was in part because of my experience doing citizen suits at what was then the Sierra Club Legal Defense Fund that the possibility of the city itself taking action directly against the polluters was viewed as a real option. Now, it did take about a year to get permission from the NYCDEP, our client, and the Mayor's office to bring these cases. For over 100 years, the city's approach to watershed protection had been to encourage compliance, a process it called jawboning, and to trust that the sheer size of the watershed would dilute any appreciable amount of pollution. It never litigated. The city does have, under a unique state law, certain water quality regulatory authority in the watershed. However, that authority had laid unused. When we brought a case using the provision, it was the first time the law had been used in court in over 100 years since it was enacted. Needless to say, the trial judge, when we brought it, looked at us as if we were nuts and ruled against us, but we did win on appeal. The point is that for the city, litigation was an unusual tack. We did finally get approval and we sent out a wave of notice letters.

Now, in all of these cases, we had already sent letters to the violators regarding their permits. Many of these violations were not publicly known because the permittees didn't report to the state regulatory agency, but we had sent letters saying we knew they were violating their permits. We sent inspectors who noted that they were violating their permits and their operational requirements. That hadn't worked. Then we sent a wave of CWA 60-day notice letters saying that we would sue them, and that was remarkably effective. There were a number of facilities that fired their operators, hired new ones, and came to compliance virtually within a matter of weeks. Others had to do some upgrades, but still agreed to come into compliance. With others, we had to litigate to some extent. In most cases, we reached a binding consent decree that we entered in federal court, many of which remain in effect today.

Over the next few years we brought close to 40 separate citizen suits against sewage treatment plants in the watershed. These cases differed from the traditional citizen suits that you've been hearing about in several ways. As the city of New York, we really never had to worry about standing. On the other hand, we probably did worry a little more than a classic citizen group does about the state's reaction. We were treading on [what] the state's turf and city-state relations are, as you can imagine, quite intense and multifaceted. So we were, in fact, a little concerned about how they would react and dealt with that carefully. We also, recognizing that the watershed was outside of the city's general jurisdiction, typically waived attorneys fees and requested that any penalties be assessed in the form of supplemental environmental projects rather than monetary payments. This made a great difference in terms of the political responsiveness upstate.

We also had a slight difference because although we were wearing, in our view, the white hat, our hat had a few smudges on it. The city itself owned sewage treatment plants and, frankly, they were some of the worst violators. Thus, it was not uncommon for the owner/operator of an upstate plant to accuse us of hypocrisy. Fortunately, there were upgrade orders entered against the city's plants, which would bring many of them into compliance, so we were able to say that we were asking of them nothing more than we were demanding of ourselves. (Many of these orders were the result of citizen suits themselves.)

We hoped that this enforcement effort would get the state to step up its own enforcement activity and relieve the city of a politically incendiary effort. But the state never really did step up its enforcement efforts up there, at least back then. The cases were, by and large, too small for the state and the stakes weren't high enough for it to risk the political fallout of enforcing state law against upstate towns for the benefit of the city.

For the city, the stakes were much, much higher. Although we started these cases in an effort to improve water quality, we ended up relying on them as part of our watershed protection strategy in order to avoid a mandate under the Safe Drinking Water Act [(SDWA)][40] to filter the water supply. So these cases not only made a difference in terms of the actual water quality, but they set in motion an entire program that is still in effect. Indeed, the broad program is of nationwide interest and would not have been possible if we hadn't gotten that first filtration avoidance determination.

It was, in part, the success of this effort that led the state, many years later, to consider CAA citizen suits against midwestern coal-fired power plants. Now, these coal-fired power plants emit vast amounts of sulfur dioxide [(SO_2)], nitrogen oxide (NO_x), and a host of other pollutants that follow prevailing winds and are dumped in the Northeast. This pollution kills our lakes. It poisons our people.

Just as the basic problem in the city of the pollution of the watershed from sewage treatment plants was acknowledged, so the basic fact of interstate transport of pollution was well known. Many federal studies had documented this transport of air pollution from midwestern power plants to the Northeast. In New York's Adirondacks, for example, over 80% of the pollution of the sulfates comes from out of state. Or for another, if Rhode Island, which is a co-plaintiff in some of these cases, could turn off every factory, every boiler in the state, and park every car, it would still be out of compliance with the CAA because of what comes in from out of state. We knew the problem. We just didn't have the legal response.

For years, the downwind states had tried through persuasion, politics, and litigation to get the federal government to address the interstate pollution problem. We had sought tighter controls under CAA §126, which gives EPA the authority to impose stricter limits on out-of-state pollution sources, and urged EPA to issue its NO_x state implementation plan (SIP) call requiring states to lower NO_x limits. Although these efforts were somewhat successful, they clearly weren't enough. They didn't address the whole suite of pollutants. Perhaps more importantly, they were too indirect. We were suing EPA to get the Agency to require the states to develop the plan to get the companies to eventually put on controls that maybe would do something. There were so many layers and opportunities for governmental inaction, delay, and litigation, that we realized we had to do something a little more direct. So we looked around for alternate opportunities and wondered whether there were citizen suit possibilities.

We examined the records of these coal-fired power plants and discovered that, in fact, they were out of compliance with the law. Just as sewage treatment plants up in the city's watershed were violating their SPDES permits, so these coal-fired power plants were violating the new source re-

40. 42 U.S.C. §§300f to 300j-26, ELR STAT. SDWA §§1401-1465.

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view (NSR) provision[41] of the CAA. Just as very few people really knew that the sewage treatment plants in the watershed were violating their permits because the reporting requirements were so inadequate, very few people actually knew at this stage that these power plants were violating the NSR provisions.

The CAA requires new facilities to have state-of-the-art pollution controls. For power plants, for example, a scrubber would reduce [SO_2] emissions by over 95%. Selective catalytic reduction would reduce NO_x emotions by over 90%. Old plants, however, under the theory that they would soon wear out and be retired, were exempted from this pollution control requirement. But Congress limited the grandathering provision by providing that an old plant, if it were modified and its emissions increased, would be treated like a new one and would be required to install modern pollution controls.

Grandfathering turned out to be a gold mine for power plant operators. Old, fully depreciated plants running on cheap, often dirty coal, without the capital or operational costs of any pollution controls, were terrific money makers. They were running them all the time, producing huge quantities of pollution and benefiting from basically free waste disposal by dumping the waste into our lungs and our lakes.

But make no mistake—these companies knew exactly what they were doing. I am confident that they knew they were violating the law. And they did so very, very quietly. They only announced it in a few discrete places. For example, they would go to their state public utility boards where they would have to go to get permission for a rate increase to put expenses into their rate base, and explain that these life extension projects at these power plants were terrific investments for the ratepayers because if they didn't keep these old power plants going longer, they would have to invest in a new power plant, and the new facility would have expensive pollution controls at a higher cost for the ratepayer.

We discovered evidence of these violations, but it wasn't very easy. We had to piece together information from the EPA air emission data, records from the public utility commissions, websites of companies that were consultants to the power plants that boasted about their facility life extension projects. We put it together and found that we believed that we could prove many actions of these plants to be violations of the NSR provisions. Rather than begging the federal government for help, we decided we would just sue the polluters themselves and ask a court to impose pollution controls. I think it's fair to say that when we did this, all the power plant owners, as well as probably the midwestern states, were a bit surprised.

I do want to emphasize that at the same time that we sent out these notice letters to the midwestern plants, we also sent out, not notice letters, but rather administrative enforcement notices to in-state coal-fired power plants. We believed then and we continue to believe that it is critical that we ask out-of-state plants only what we are asking of in-state plants. So we were bringing the same kind of enforcement actions against in-state plants that we are instituting against out-of-state plants.

The federal government, fortunately, worked with us on these cases. But I think it's important that New York's commencement of these cases made it both more important and more acceptable for EPA to do what I think it's fair to say EPA's staff was very interested in doing. Normally, of course, EPA defers to state enforcement. But once New York had sued power plants in Ohio and West Virginia, it became much more acceptable for EPA to join in these efforts. The attorneys and technical staff at EPA and the [DOJ] have been working very closely with us. We finished a trial against Ohio Edison recently, and the cases are still going on aggressively.

It's too early to say all the results of these NSR citizen suits, but a couple of things are clear. First, the cases hold great promise for real pollution reductions. After about a year of negotiations, we reached agreements in principle with two companies which would have them spend over $2 billion to reduce their systemwide emissions by about 70%. Unfortunately, the change in administration led to, shall we say, a change in the context of the negotiations, so the agreements have yet to be reduced to a consent decree, although we are still hopeful that we might get there.

Second, these cases made NSR, if not a household word, at least a pretty common provision, a well-known provision in environmental debate, and made apparent the need for dramatically greater pollution reductions. These cases threaten the companies with such serious obligations that for the first time they are willing to consider additional legislative responses to air pollution. I am no fan at all of Clear Skies, the president's plan, but that the most antienvironmental president we have ever had is proposing anything in the area is, I think, a testament to the fact that they are terrified of these NSR cases. Clear Skies would repeal NSR as the price, or the benefit to the power companies, in exchange for the reductions the bill would otherwise achieve.

Third, while EPA joined the case and provided terrific technical and legal support in these cases, the states' involvement has been critical. I think it's fair to say without the states' involvement, the federal prosecution of these cases would have suffered dramatically with a change of administration. While there's a few citizen groups in some of these cases, the clout, the political strength of the states, as well as our resources, have made their involvement much more of a bulwark to encourage continued federal involvement than citizen-only involvement would have been.

Finally, the mere existence of these cases has affected the utilities' plans under other provisions of federal law. It seems that nowadays you need three or four laws that all require the same thing these powerful companies comply. But with NSR now being enforced, as well as the acid rain provisions and the NO_x SIP call, companies are responding, for example to the acid rain provisions, with recognition that NSR may impose similar requirements. They can shift their compliance strategies accordingly, perhaps to more controls and less reliance on credits.

In addition to these citizen suits against polluters, states also have brought cases against EPA; we've sued EPA a number of times. One case that we announced a while ago seeks to require EPA to impose carbon dioxide limits on power plant emissions. This is based on the widespread recognition of the harm of global warming and the contribution of power plants to global warming. Local governments also have brought similar citizen suits against EPA.

We also bring cases that aren't, technically speaking, citizen suits, such as NEPA lawsuits.

41. 42 U.S.C. §7479(2)(C), ELR STAT. CAA §169(2)(C).

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In sum, while the classic model of citizen suit litigation is of a citizen plaintiff against governmental defendant, or sometimes against a private defendant, it's important to remember that citizen suits are simply suits brought by any person, including the states or the local governments.

I'll close by mentioning one of my pet peeves, which is that the federal government in litigation loves to refer to itself as "the" government. The federal government is not "the" government. Instead, it is "a" government. It's important to remember that states and local governments have tremendous opportunities. They have legal resources, standing, and interests that are not necessarily the same as the federal government. They are, I would submit, a dramatically underutilized resource. Often they don't know about citizen suits, but once educated, they can be very effective allies in the fight for a clean and healthy environment.

PROFESSOR KENNEDY: I'm pleased to be a part of this conference, which has brought together the major environmental activists who are doing citizen suits in this country. For those of you who don't know, I work for the Hudson Riverkeeper. This was a group that was founded on the idea that government cannot be relied on to enforce the environmental laws, and that if we want to save our resources, we've got to figure out a way to do it ourselves.

The [Hudson] Riverkeeper was founded by a bunch of former marines, almost all of them commercial fisherman, along with some recreational fisherman, who mobilized on the Hudson River back in 1966. They got together in an American Legion hall. They saw their livelihoods being destroyed. They saw their property values being destroyed. These were people who were carpenters and electricians. They weren't your prototypical affluent environmentalists. They were fighting for their communities. They saw their communities being destroyed by environmental degradation on the Hudson, and they got together in an American Legion hall, 300 strong. They talked about bombing pipes on the Hudson River, putting a match to the oil slick coming out of the Penn Central Pipe at the Croton-Harmon Rail Yard, and floating a raft of dynamite into the intake of the Indian Point Power Plant, which at that time was killing a million fish a day on its intake screens and taking food off their families' tables.

A guy stood up in that meeting, a recreational fisherman and former marine named Bob Boyle. He was the outdoor editor of *Sports Illustrated* magazine and he one of the gurus of dry fly-tying. Two years before he had written an article about angling in the Hudson. In researching it, he had come across an ancient navigational statute called the Rivers and Harbors Appropriation Act of 1899.[42] That statute said it was illegal to pollute any waterway in the United States, that you had to pay a high penalty if you got caught, but also there was a bounty provision that said anybody who turned in a polluter got to keep half the fine. He had sent a copy of the law over to the libel lawyers at Time, Inc., and he said: "Is this still good law?" They sent a memo back saying that in 80 years the bounty provision had not been enforced but was still good law. That evening, while others were talking about violence, he described using the law to address water pollution.

Today in New York City one out of every six black children has debilitating asthma, and those asthma attacks are triggered by particulate and ozone pollution. It is kind of a science fiction nightmare to say that we are bringing children into the world today where we have poisoned the air so much that it is toxic for them to breathe. In the state of Connecticut, there's now advisories on eating any freshwater fish because of mercury contamination. There's no geological source of mercury in state. Most of it is coming from a handful of power plants in the Ohio Valley that have just been given another buy. They are 50 years old. They were supposed to have been closed down during the last decade. They've just been given another lease on life by the Bush Administration.

To me, it's a radical notion that somebody should be able to line their pockets with money in order to poison children in New York City and the waterways of Connecticut. Imagine that. In the state of Connecticut, you have a million people a year paying $60 apiece for fishing licenses, to enable them to go to a fishing hole or the Housatonic or Connecticut rivers and pull out a fish and bring it home and feed it to their family with pride with the security that they are not poisoning them. But that right has been robbed from those permit holders. That, to me, is a radical, unreasonable notion.

The fishermen meeting at the American Legion hall began enforcing the statute Mr. Boyle had uncovered. Eighteen months later, in 1968, they shut down the Penn Central Pipe. They were the first people ever to collect a bounty under the statute. They got $2,000. They used that money to go after all the other big polluters on the Hudson: Ciba-Geigy, Standard Brands, American Cyanamid. In 1973, they collected what was then the highest penalty in U.S. history against a corporate polluter. They got $200,000 from Anaconda Wire & Cable for dumping toxins in Hastings, New York. They used the money from the boundary to construct a boat which they called *The Riverkeeper* and they began patrolling the river tracking down polluters.

They used bounty money in 1983 to hire their first full-time riverkeeper, John Cronin, a former commercial fisherman. He used bounty money to hire me a year later as the attorney for the group. Then we started the clinic at Pace Law School where our students are each given four polluters to sue at the beginning of the semester and they file complaints. Karl Coplan is the brains behind the operation. He and the students go to court and they argue the cases. About three weeks ago, one of our students, part of a team of three attorneys, argued a case before [the U.S. District Court for the Northern District of New York]. They achieved what I believe is the highest penalty assessed in a citizen suit against a municipality, $5.7 million against New York City for contaminating a trout stream up in the Catskills.

We've brought over 300 successful legal actions. We've forced polluters to spend over $3 billion on remediation of the Hudson. Today the Hudson is an international model for ecosystem protection. This is a waterway that was a national joke in 1966. It was dead water for 20-mile stretches north of New York City, south of Albany. It caught fire. It was an open sewer. Today it's the richest water body in the North Atlantic. It produces more pounds of fish per acre, more biomass per gallon than any other waterway in the Atlantic Ocean north of the equator. It's the last major river system

42. 33 U.S.C. §407 provides that it is unlawful to throw, discharge, or deposit any refuse matter, other than that flowing from streets and sewers and passing into a liquid state, into U.S. navigable waters or tributaries of navigable waters.

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left on either side of the Atlantic that still has strong spawning stocks of all its historical species of migratory fish. It's Noah's Ark. It's a species warehouse. It's the last refuge for many of these animals that are going extent and the miraculous resurrection of the Hudson has inspired riverkeepers across North America, including the one on the Delaware.

There are currently 105 licensed riverkeepers. Every one of them, in order to get a license, must be willing to litigate. They have to have a patrol boat. They are fighting to protect local waterways on behalf of local communities.

This isn't about protecting fishes and birds for their own sake. It's about recognizing that nature and the environment is the infrastructure of our communities. If we want to meet our obligation as a nation and as a generation to create communities that give our children the same opportunity for dignity and enrichment as the communities that our parents gave us, we've got to start by protecting the environmental infrastructure. We now know that it is part of the commons and that industry is going to try to grab it and use it for free, and that our job is to stop them and to protect the commons and to fight for it [on] behalf of the communities and our obligation to the next generation. We are emissaries for the future generations. That's what our role is. It's not about protecting nature for nature's sake, but rather about protecting the trust obligation that our generation has to the next generation, and to the residents of our communities who shoulder the disproportionate burden of environmental injury because they don't participate in the political process effectively, lacking the money to do so.

The environmental movement has been fighting on Capitol Hill, since 1994 when the [Rep. Newt] Gingrich (R-Ga.) Congress came in, against an effort to dismantle the environment. When we cleaned up the Hudson and these other waterbodies across the country, it imposed a cost on industry. Industry got more and more sophisticated about protecting its interests in polluting and destroying the commons. One of the things that they've done is invested huge amounts of money in what we called greenwashing, which is this process of using these giant firms like Burson-Marsteller and Hill & Knowlton to persuade the public that environmental problems don't exist, the ozone hole is a myth, global warming doesn't exist, DDT is good for you, the forests actually grow better when you cut down all the trees, and as they said on the Hudson, you actually get more fish in the river by killing as many as possible at the power plants.

If you go to Europe, everybody believes that global warming exists. Nobody there thinks there's a debate about it. It's only in this country that the "debate" exists, because industry spent a huge amount of money hiring phony scientists, putting them in fancy think tanks on Capitol Hill because they know it's cheaper to hire a scientist than a lobbyist. People like Fred Singer and Elizabeth Whalen go out on the Ted Koppel show, *Nightline*, every night and are quoted in the *Wall Street Journal* and do op-eds in the *Washington Times*. They get their money from the coal companies and the American Petroleum Institute and from corporate agriculture, etc., and they try to persuade the public that environmental issues don't exist. We call them "confusionists" because they don't really have to win the debate. All they have to do is persuade the public that there is still a debate.

Good science is hard work. You work for 10 years at a university and you produce a tome that's 10 inches thick that nobody's going to read except some of your colleagues. Former scientists like Fred Singer go to think tanks at Capitol Hill, where he writes material on the benefits of cigarette smoking, on why its good to kill whales, why seat belts and air bags are bad and why cholesterol is good for you. It's tobacco science. The tobacco industry invented it and perfected it. But it is taken seriously. He cranks out slick one-page pronouncements that a journalist or a congressman can put in his briefcase between [Capitol Hill] and National Airport and read in five minutes. The journalist is faced with reading the 10-inch tome or reading this 1-page, succinct, well-written pronouncements and he looks at them both and he looks and says, well, there's still a debate. Even though 99% of the scientists say that global warming exists, a few say we still don't know, the jury's still out. Thus, there's still a debate.

If the antienvironmental proposals that have been introduced in Congress since 1995 had actually become law, we would effectively have no significant federal environmental law left. That's not exaggeration or not hyperbole, but fact. Many of our laws would have remained on the books in one form or the other, but they would have been essentially unenforceable. It would be like Mexico, which has these wonderfully poetic environmental laws, but nobody knows about them and nobody complies with them because they can't be enforced. Now President Bush, the most hostile president to the environment we've ever had, is doing the same thing, but it's completely sub rosa. It's below the radar. It's all happening in the agencies. NRDC published a booklet that describes 100 separate initiatives by the Bush Administration to destroy environmental law through the agencies without ever having to go to Congress, without ever having to publish in the *Federal Register*. It's happening now. Even if a fraction of the initiatives are successful, we won't be able to rely on the federal legal infrastructure.

Greg Wetstone of NRDC and I met recently with the editors of *Newsweek* because we were trying to persuade them to write a feature piece on the environment. Jonathan Alter, who is a really smart reporter, said: "You know, aren't the environmentalists really digging their own graves by having this kind of command-and-control philosophy?" He is one of the best informed reporters in the country and has written extensively on environmental issues. Yet this is how he sees the world. The reason he does so is because that's how industry wants us all to see the world, that the environmental movement is about command-and-control, top-down regulation, that it's this thing that was dreamed up by these crazy radicals at Earth Day and imposed on the American public and that it's a threat to democracy, the free market economy, our economic prosperity, property values and individual freedoms, and is the kind of luxury that we really can't afford. Clean air and water are things that we probably can't afford.

If you think about it, that's a radical notion, that we can't afford clean air and clean water. That's the notion they're urging on Capitol Hill. The best reporters in the country are eating this stuff up and believing it.

I'll tell you something. Environmental law has been around forever. We didn't dream this up in 1970. It has never been legal to pollute. Ever. In the 1600s, there was a clean air act in England and it was made pollution a capital crime; people were put to death for burning coal in their stoves in London. It's always been illegal to pollute. We had nuisance law and the public trust doctrine. In every jurisdiction in this

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country up until 1870, if you built a factory next to my home and smoke from your factory got into my home as much as one day a year, as little as one day a year, I had an absolute right to close down that factory. The judge did not have any option except to close down that factory. The only thing the chancery judge could do was grant or deny injunctive relief. He couldn't give you damages. This was the law. You didn't have a right to interfere with the use and enjoyment of somebody else's property, of your neighbor's property.

During the industrial revolution, in order to accommodate industry and the prosperity that it was bringing to our country, legislatures and judges began rewriting the law and they added numerous criteria that gave industry a way out, balancing the equities so that polluters no longer had to close down. You could balance the utility of that activity to the rest of society. Consider the individual whose only use of the Hudson River is for fishing. He doesn't live on it or drink from it. He doesn't operate a factory. He just uses it occasionally. But it's important. It's an enriching aspect of his life. What does he do when the river becomes too polluted to fish from? He turns his back on it and does something else for recreation. The vast majority of people who have ownership of that resource are simply going to turn their backs if it becomes polluted and ignore it because they are not going to sue [the General Electric Company (GE)] for 10 years and ruin themselves economically in order to do that.

But under the old law, what happened is if you polluted the river and there was a big landowner downstream and all of his cows died, he sues you, and the remedy is you shut down the factory. Now you've got damages. So instead of shutting down the factory, the judge will say: "Will you pay him for his dead cows?" And you get to continue to pollute the river. So the river stays polluted. All of the people who had rights to that river, all the little atomistic, fragmented rights—the people who used it for washing, swimming, etc., all of their rights disappear because they're not going to defend them and they no longer have the defender of the single wealthy person who has the resources to litigate the case for years and years. So what happened is the commons were just given away.

The public trust doctrine was the other mechanism that protected the commons. That was a right that we all have since ancient Roman times. The doctrine essentially says the commons, those things that are not susceptible to private ownership, the air we breathe, the water, the wandering animals, the fisheries, those things belong to the people, not to the corporations. They belong to the people. Everybody has a right to use them. Nobody has a right to use them in a way that will diminish or injure their use and enjoyment by others. Both public trust and nuisance were eroded during the industrial revolution. We got to a point where we needed Earth Day because industry abused its privilege. They destroyed the commons.

I remember what it was like before Earth Day. I remember the Cuyahoga River burning for a week with flames that were eight stories tall. I remember when they declared Lake Erie dead. I remember that I couldn't swim in the Hudson or the Charles or the Potomac growing up, and what the air smelled like in Washington, D.C., which wasn't even an industrial city. It stank. Some days you couldn't see down the block for the smog. We had thousands of Americans dying in our cities every year from air pollution. Young policy members on Capitol Hill and at the White House don't have these memories. They are beneficiaries of the success of our federal environmental laws, but all they see is the cost of environmental regulations to their buddies who gave them or their members political contributions. They don't see the benefits that we've gotten through these investments in our environmental infrastructure and the asset protection that is represented by that investment.

You know, I'm a falconer. I train hawks. You got a lecture from Zyg on fly fishing and I am not going to give you one on falconry, but when I was a little boy, there was a pair of eastern and peregrine falcons that were nesting on the old post office building on Capitol Hill. I used to go visit my uncle with 9 or 10 of my brothers or sisters at the White House once or twice a week and I would always look down Pennsylvania Avenue, for a view of the most spectacular predatory bird in North America. It was salmon pink and had a beautiful white coverlet on its nare. It was the fastest bird on earth, 240 miles an hour. I used to watch these birds come down Pennsylvania Avenue at those speeds and pick pigeons out of the air 40 feet above the heads of the pedestrians and then fly them back to the cupola of the post office.

To me, seeing a site like that was far more exciting than visiting my uncle in the White House. But that's a site my children will never see because that bird became extinct in 1963 from DDT poisoning. We have falcons now back in Delaware and Pennsylvania and in other locations along the East Coast, but it's not the same bird. It's a hybridized progeny of many different subspecies that were mixed and matched and bred in captivity and then released into the wild. It's nowhere near as spectacular as this creature that took a million years to evolve and then disappeared in a blink of an eye because of ignorance and greed.

On Earth Day in 1970, this accumulation of insults drove 20 million people out into the streets, 10% of our population, the largest demonstration in American history, demanding that our political leaders return to the American people the ancient environmental rights that had been stolen from our citizens over the previous 80 years. The Republicans and Democrats got together because they were so frightened by this public outburst, and they passed over the next 10 years 28 major environmental laws that protect our air and water, endangered species, food safety, wetlands. Those laws have now become the model for over 100 nations around the world that have made investments in their own environmental infrastructures. The nations that have not done so are mostly those that are dictatorships, because there is a direct correlation between the level of democracy in a country and the level of environmental degradation. Consider the right wing tyrannies such as Brazil in the 1970s or Saddam Hussein's Iraq in the 1980s and 1990s, and the fact that China and the Soviet Union are now facing the consequences of their failures to investment.

The notion that environmental protection is harmful to our economy, or to any nation's economy, presents a false choice. Good environmental policy is always good economic policy. We can measure our economy based upon how it produces jobs and value of the community assets over the long term, over the generations. If, on the other hand, we treat the planet as if it were a business in liquidation and seek to convert our natural resources to cash as quickly as possible, in order to have a few years of pollution-based prosperity, we can generate an instantaneous cash flow and the illusion of a prosperous economy, but our children are going to

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pay for our joyride, with diluted landscapes and poor health and huge cleanup costs that they are never going to be able to afford that amplify over time. Environmental injury is deficit spending. It's a way of loading the costs of our generation's prosperity onto the backs of our children.

If you don't believe that, look at the nations that didn't invest in their environment back in the 1970s the way that we did. Russia is a great example. The Azov, Baltic, and Caspian seas are heavily polluted, as are the [Barents, Black, Japan, Okhotsk, and White] seas. Russia didn't have a NEPA or a CWA. The Aral Sea, the largest freshwater body on earth after the Great Lakes, is now a desert. Another sea that was the richest fish nursery on earth is now a biological wasteland. They didn't have nuclear regulatory review requirements of the kind we passed after Earth Day, and because of that, one-fifth of Russia is now permanently uninhabitable from radiation contamination.

In China, one of the growth industries in Beijing is oxygen bars where people literally go to buy a breath of fresh air. In Thailand, you can see people on any street wearing gas and particle masks. The average child in Bangkok—by the age of six years—has permanently lost seven [Intelligence Quotient (IQ)] points because of the density of airborne lead contamination at ground level because they didn't have a CAA that requires the removal of lead from gasoline.

One of the things that they love to say on Capitol Hill is that, well, we are going to get rid of the federal law and we'll return control to the states because, after all, that's local democracy and community control and the states are in the best position to patrol and protect their own environments. But the real outcome of that devolution will not be local control. It will be corporate control because these large corporations can so easily dominate the state political landscapes. Consider the history of the Hudson Valley, prior to the advent of the federal environmental laws. [GE] came into the poverty-stricken upstate towns of Fort Edward, [Glens Falls, and Hudson Falls], New York, and they said to the town fathers, we are going to build you a spanking new factory. We are going to bring in 1,500 new jobs. We are going to raise your tax base. All you have to do is waive your environmental laws and let us dump [polychlorinated biphenyls (PCBs)] into the Hudson River and persuade the state of New York to write us a permit to do it. And if you don't do that, we are going to move across the river to New Jersey and we'll do it from over there and they'll get the jobs and the taxes and you'll still get the PCBs.

Fort Edwards and Hudson Falls went along, taking the bait, and two decades later GE closed the doors on those factories, fired the workers, and left town with their pockets stuffed with cash. The richest corporation in the history of mankind, and also the biggest polluter in our country. They own 83 Superfund sites. More than any other corporation. They left behind a $2 billion cleanup bill that nobody in the Hudson Valley can afford. There are 1,000 commercial fisherman who are now permanently out of work because although the Hudson is loaded with fish, the fish are still loaded with [GE's] PCBs and they are too toxic to legally sell in the market. The barge traffic on the upper portion of the river has dried up because the shipping channels are too toxic to dredge. All of the land that was occupied by [GE's] factories with tax breaks from the grateful localities is now permanently off the tax rolls, robbed from those communities as a source of revenue or recreation, every woman between [Albany and Oswego, New York,] has elevated levels of PCB in her breast milk and everybody in the Hudson Valley has [GE's] PCBs in our flesh and in our organs.

The federal laws were intended to end that kind of corporate blackmail and stop these powerful entities from coming in and whipsawing one community in New York against another in New Jersey or one in Delaware against others in [Maryland or Pennsylvania] to get them to lower their environmental standards in exchange for the promise of a few years of pollution-based prosperity, and to ransom their children's future in the process. The federal laws democratized our country in an extraordinary way. More than any of the other progressive social movements, the environmental movement gave citizens real local power, by allowing us, if somebody comes into our neighborhood and says I'm going to put a corporate hog farm in your backyard, to say: "No, I want to see an [EIS] that tells me what this is going to do to my community over the generations. I want a hearing on that. I want to be able to bring in my own witnesses and cross-examine yours. I want a transcript in front of a judicial tribunal and a decision based upon a rational interpretation of that transcript. If you don't give it to me, I have a right to appeal." If a big-shot polluter is in your neighborhood because he's bought off or intimidated the regulatory agencies that are supposed to stop him, then you have a right to step into the shoes of the U.S. attorney and drag that polluter to a federal court for the imposition of fines and injunctive relief.

We have these rights because of the presence of the federal environmental statutes and the successes of the environmental movement. Industry says: "Well, this is terrible because it's going to take time and cost more money." It's true. Democracy is inefficient and sloppy. But in the long run, there is no system that's better or more efficient for allocating the resources of the land. Consider what happened with the nuclear industry before the advent of modern environmental impact assessment. Concerned citizens were relegated to merely asking: "Please tell us what are you going to do with this stuff when you have to close the plant in 30 years?" All they had to say was: "Don't worry, we'll figure out something between now and then." Now we are faced with taking care of the nuclear legacy for the next 30,000 years, which is five times the length of recorded human history, and paying for it ourselves. We could have used that money for developing solar or wind-powered technologies, for education, for improving our communities rather than endangering them. So democracy is inefficient in the short term, but in the long run there's no system that's more streamlined or efficient.

I am, indeed, a strong advocate for free market capitalism. I believe that the free market is the most efficient and democratic way of distributing the goods of the land, the bounties and the benefits of our country and the earth. But in a true free market system, you can't make yourself rich without making your neighbors rich and without enriching your community. What polluters do is make themselves rich by making everybody else poor. They raise standards of living for themselves by lowering the quality of life for everybody else. They do that by escaping the discipline of the free market. You show me a polluter, and I'll show you a subsidy. I'll show you a fat cat who is using political clout to escape the discipline of the free market. The best thing that could happen to the environment would be true, competitive free market capitalism. But what many polluters do is enjoy hun-

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dreds of billions of dollars worth of environmental subsidies. I can tell you, they are a bunch of cry babies. I have to deal with them all the time and you can hear them whining as soon as you pull the federal nipple out of their mouths.

Other polluters seek to avoid bearing or passing on in the pricing of their products the cost of avoiding emissions or properly disposing of a dangerous waste. By avoiding these kinds of costs, they are able to, at least for the short term, enrich their shareholders and perhaps place a more conscientious competitor out the business, but the costs don't go away. The PCBs released into the Hudson, for example, went into the fish and made the people sick. Barge traffic dried up, harming many businesses and local economies. Meanwhile, the polluter was able to take the land off the tax rolls and eventually put its employees out of work. These impacts created substantial costs on the rest of us that should, in a true free market economy, be reflected in the price of the polluter's product when it makes it to market. But GE did what all polluters do, which is to use its political clout to escape the discipline of the free market and force the public to pay its cost of production.

What we do with our citizen suits is to act as free market enforcers. We go out into the marketplace, we catch the cheaters, and we say to them we are going to force you to internalize your costs the same as you internalize your profits. When polluters externalize their costs, they are cheating the marketplace. And when they do so, the rest of us are deprived of the efficiencies that the free market promises otherwise to deliver to us. That's why we've got to catch the cheaters. So I don't consider myself to be an environmentalist. Instead, I consider myself to be a free market advocate.

What I and others who pursue citizen suit litigation do is protecting property rights from people who want to pollute them. We are protecting the free market economy, democracy, the basic American values. Our opponents have been able to twist the debate by convincing reporters from *Newsweek* and others that we are proponents of command-and-control. It's not about command-and-control. The statutes and implementing regulations are not mechanisms of command-and-control. They instead provide licenses to pollute. In contrast, nuisance law and the public trust doctrine provided that there's no right to pollute. The CWA and the CAA restate that premise, but because we want people to continue economic activities that are beneficial to our communities, we have the ability to give you licenses to put a little bit of pollution into the environment, but we are going to make sure of two things: [(1)] You can't pollute enough to hurt animals or people, no matter what, and [(2)] you've got to use the best available technologies.

That's what the alleged notion of command-and-control is—if industry is to be allowed to do something that has traditionally been determined to be illegal, conditions must be imposed on the activity. And it's a favor to industry that we are giving them this ability to pollute which they don't otherwise have a right to do. Framing the discussion in a way that characterizes the federal environmental structure as "command-and-control" is fundamentally incorrect and disingenuous. What we are saying is that this is an opportunity for industry to do something that it otherwise has no right to do, which is to pollute our water and land.

As I noted earlier, we are not protecting these assets for the sake of the fishes, and birds, but for our sake, because we recognize that nature enriches human existence, in many ways. It enriches us economically, and we ignore that fact at our peril. It also enriches us aesthetically, recreationally, culturally, historically, and spiritually. When we destroy nature, we diminish ourselves, and we impoverish our children. We're not fighting to protect those ancient forests in the Pacific Northwest, as Rush Limbaugh loves to say: "For the sake of a spotted owl." We are protecting those forests because we believe that the trees have more value to humanity standing than they would have if we cut them down.

I'm not fighting for the Hudson River for the sake of the shad and the sturgeon and the striped bass, but because we believe that our lives will be richer and our children will have richer lives and our community will be enriched if we live in a world where there are shad and sturgeon and stripers in the Hudson, where my children can go out onto the river and see the fisherman in their tiny open boats doing what they've been doing since the Algonquin Indians taught them how to do it, using traditional gear, practicing sustainable fishery. They are part of a continuum, of a community.

I don't want my children to grow up in a world where there are no commercial fisherman left on the Hudson, where it's all Gorton's seafood 150 miles off the coast with their giant trawlers strip-mining the ocean, and where there are no family farmers left in this country, but merely big corporations who raise animals in factories and pave the landscapes that connect us to our history, give us context to our values, virtues, and identity as a people, and connect us ultimately to God. I don't believe that nature is God or that we ought to be worshipping it as God. But I do believe it's the way that God communicates to us most forcefully. God talks to human beings through many vectors—each other, organized religions and their great books, art, literature, music, and poetry, but nowhere with such clarity, detail, texture, grace and joy as through creation. We don't know Michelangelo by reading his biography. We know him by staring at the ceiling of the Sistine Chapel. The way that we understand the nature of our cosmology and creation is by looking at creation itself. When we harm the environment, there's not only an economic impact, but moral implications. We don't have the right to impose those burdens on future generations.

That's what environmental advocacy is about. It's about recognizing that we owe something, a debt to our children and to the other members of our community that don't always participate effectively in the political process because they lack the money. The obligation is expressed by the term "sustainability," in that God wants us to use the things we've been given to enrich ourselves, to improve our quality of life, and to serve others, but in a sustainable fashion. We can't sell the farm piece by piece in order to pay for the groceries. We can't drain the pond to catch the fish. We can live off the interest, but we can't go into the capital. That belongs to our children. The citizen suit provisions enable us to elbow our way into the courtrooms, to the table and we say we are emissaries for the future and we demand an accounting. We want to know what you are doing with things that don't belong to you, with things that belong to our children.

I'll close with the proverb from the Caddo people that's been expropriated to a large extent by our movement: "We didn't inherent this planet from our ancestors; we borrowed it from our children." I would add that if we don't return to them something that is roughly the equivalent of what we received, they'll have the right to ask of us some difficult questions.